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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

B. WILLIS, C.P.A., INC.
BUCK WILLIS,

Petitioners,

v.

JAMES D. GOODPASTER, sued as:
The Honorable James D. Goodpaster;
PUBLIC SERVICE COMPANY OF
OKLAHOMA; JOHN DOE, sued as:
John Doe 1-100,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is the decision of the Court of Appeals based on a refusal to follow state law as pronounced by the Oklahoma Supreme Court?

PARTIES TO THE PROCEEDING

Petitioner

B. Willis, C.P.A., Inc., is a professional corporation wholly owned by Buck Willis, C.P.A. It has no subsidiaries.

Respondents

Public Service Company of Oklahoma is a wholly owned subsidiary of Central and Southwest Corporation. It has previously identified the following parent, subsidiary and affiliated companies that have issued shares to the public.

1. Central & Southwest Services
2. CSW Credit
3. CSW Communications
4. CSW Energy
5. CSW International
6. CSW Leasing
7. Central Power & Light Co.
8. EnerSho
9. Southwest Energy & Power Co.
10. West Texas Utility Co.
11. Ash Creek Mining Co.

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OPINIONS BELOW

The Order and Judgement of the United States Court of Appeals for the Tenth Circuit is published at __ F.3d _ (10th Cir. 1999). A copy of the Order and Judgement is included in the Appendix as Appendix A at 1a. The order at the U.S. District Court for the Northern District of Oklahoma is unpublished and included as Appendix B at 9a. The opinion of the Oklahoma Supreme Court in the related state eminent domain proceeding is reported at 941 P.2d 995 (Ok. 1997). A copy of the opinion is included as Appendix E at 27a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its Order and Judgement on July 20, 1999, (App. A at 1a).* This Petition for Writ of Certiorari is filed within 90 days of the Order and Judgement. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amdt. I

Congress shall make no law...abridging the

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* Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari to Supreme Court Rule 15(i).

freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * *

U.S. Const., Amdt. XIV, Sec. 1

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

42 U.S.C. ¶1983

¶1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

* * * * *

Oklahoma Const. Article 2, Sec. 24

...In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.

* * * * *

STATEMENT OF CASE

The basis of this action is the acts of Public Service Company of Oklahoma ("PSO") in continuing to appropriate the use of the property of Petitioner, B. Willis, C.P.A. Inc. ("Willis") under color of state law prior to a hearing and judicial determination of the public nature of such use in violation of Willis' constitutional and statutory rights after the decision of the Oklahoma Supreme Court to that effect.

In 1990, PSO became embroiled in litigation with the Burlington Northern Railroad Company ("BN") when PSO breached their coal hauling contract when it became cheaper to ship on Union Pacific (See PSO v. BN, 53 F.3d 1090 [10th Cir. 1995]).

PSO subsequently filed an action in state court against Willis to condemn a railroad right-of-way over Willis' property. PSO was represented by its regular law firm of Doerner, Saunders, Daniel and Anderson, whose eminent domain department is one of the best, if not the best in Oklahoma.[1]

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[1] The present Chief Judge of the United States Court of Appeals for the Tenth Circuit, the Honorable Stephanie K. Seymour, is a former eminent domain attorney for this firm. See City of Pryor Creek v. Public Service Co. of Oklahoma, 536 P.2d 343 (Okl. 1975)

PSO also retained as local "counsel" the President Pro Tempore of the Oklahoma Senate, Senator Stratton Taylor. Willis challenged the right of PSO to take its property on various grounds including that the taking was not for public use. After an ex parte conference between Senator Taylor and the state district judge, the state district court denied Willis the right of discovery and a hearing on the judicial issue of public use on March 8, 1994 after admitting in open court that Willis had a right to such a hearing.[2] Willis appealed to the Supreme Court of Oklahoma.

After procuring a court order that flagrantly violated Oklahoma eminent domain law PSO hurriedly built a railroad across the property. On March 21, 1995, the intermediate Oklahoma Court of Civil Appeals held that Willis had been wrongfully denied discovery and an adversarial hearing on the judicial issue of the right of PSO to take the property.

On April 3, 1995, after Willis demanded that BN cease trespassing and while the case was on appeal, PSO filed a second petition in the same case and had the same state judge subject Willis to an injunction because Willis had taken the position that BN was trespassing, notified BN to stop trespassing, written letters and posted signs. **Willis has never made any attempt to actually block the line.**

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[2] Subversion of the judicial process by politician lawyers is a recurring problem in Oklahoma. For an excellent description of the practice and problem by a former Chief Justice, see JUSTICE FOR SALE - The Shocking Scandal of the Oklahoma Supreme Court, Berry William A. and Alexander, James E., Macedon Publishing Co., Oklahoma City, OK., 1996, pp. 122-127 .

On January 6, 1996, Willis filed a diversity action against BN in the United States District Court for the Northern District of Oklahoma, for trespass under Allen v. Transok Pipeline Co, 552 P.2d 375 (Ok. 1976). The U. S. District Court had jurisdiction under 28 U.S.C. §1332(a)(1). BN answered that it was licensed by PSO to use an easement acquired in the condemnation proceedings.

PSO then notified Willis that by petitioning a Federal Court, Willis had violated the state injunction and demanded a dismissal of the trespass suit against BN and threatened to intervene and seek dismissal. Willis countered by filing a 42 U.S.C. §1983 action against PSO and later by a Motion for Summary Judgement asserted §1983 claims against BN as well. The U. S. District Court had jurisdiction under 28 U.S.C. §1343(a). Willis asserted claims for violation of the First Amendment rights of freedom of speech and access to the courts and violation of the Fourteenth Amendment rights to due process of law and equal protection of the law. The District Court consolidated both actions on the grounds that the controlling issue was whether Willis was or was not entitled to a hearing in the condemnation proceeding in state court prior to PSO taking a possessory interest in the Willis property. On June 13, 1996, the District Court cut off Willis' discovery requests. On April 8, 1997, the District Court entered an Order holding that Willis was not entitled to a hearing prior to PSO taking possession of its property. The District Court entered a Final Judgment on May 13, 1997, holding for PSO and BN on the merits of the claims of Willis against them and dismissed both the trespass case and the 42 U.S.C. §1983 action. Willis filed a Notice of Appeal to the U. S. Court of Appeals for the Tenth Circuit on June 3,

1997.[3]

On June 24, 1997, the Oklahoma Supreme Court issued its opinion in the state appeal holding that PSO's possession of Willis' property violated Willis' constitutional and statutory rights. App. E at 29a, ¶1.

After the decision of the Oklahoma Supreme Court was issued, PSO continued to utilize the property under color of state law to have coal delivered to its plant and simply ignored the decision. On September 17, 1997, Willis' attorney faxed a letter to the attorney for BN, PSO's contract carrier. A few days later, PSO filed an application for contempt citation against Willis for having its counsel write a letter to Burlington Northern's counsel.

Subsequently, the state district judge whom the Oklahoma Supreme Court found had violated Willis' constitutional rights "arraigned" Willis and bound Willis over for trial for civil contempt. On November 20, 1997, the judge refused to dissolve the injunction against Willis and terminate PSO's appropriation of Willis' property even though the Oklahoma Supreme Court held such appropriation violated Willis' constitutional and statutory rights.

On December 9, 1997, Willis brought an action against the state district judge and PSO under 42 U.S.C., §1983 for violation of Willis' First Amendment right to freedom of speech and Fourteenth Amendment right to equal protection of the law. The U.S. District Court had jurisdiction under 28 U.S.C. §1343(a).

---

[3] That appeal is presently pending before this Court on Petition For Certiorari in No. 99-256.

Willis also asserted pendant state claims of unjust enrichment, abuse of process and malicious prosecution.

On June 3, 1998 the U.S. District Court granted PSO's Motion to Dismiss or In the Alternative Motion for Summary Judgement. Willis appealed to the United States Court of Appeals for the Tenth Circuit which had jurisdiction under 28 U.S.C.¶1291.

On July 20, 1999, the Court of Appeals affirmed the U.S. District Court.

ARGUMENT FOR GRANTING WRIT

The decision of both the U.S. Court of Appeals and the U.S. District Court with respect to Willis' freedom of speech, equal protection and unjust enrichment claims is based on a clear and blatant misstatement of Oklahoma eminent domain law as pronounced by the Oklahoma Supreme Court as well as a refusal to follow the controlling decisions of the United States Supreme Court.

ARGUMENT 1

The dismissal of Willis' equal protection and unjust enrichment claims was based on blatant misstatement of Oklahoma eminent domain law.

The Court of Appeals dismissed Willis' equal protection claim with the statement, "...we conclude that they were properly dismissed, for substantially the same reasons stated in the district court's order of June 4, 1998." (App. A at 8a).

In its order of June 4, 1998, the U.S. District Court dismissed Willis' equal protection claim and unjust enrichment claim for the following reasons:

> The key question is whether this court's ruling in the previous case necessarily precludes Willis' present claim that his right to equal protection of the laws has been violated by appropriation of his property prior to a meaningful hearing. This Court must conclude, that, in light of its previous ruling, that Okla. Stat.tit.66, ¶53(c), which allows possession of the property in certain instances, is constitutional, and that he does not have a right to a hearing prior to taking a possessory interest in his land, Willis does not have an equal protection claim. (App. B at 13a)

The District Court's "previous ruling" (see App. D at 19a) was that Willis did not have a right to a predeprivation hearing under the due process clause of the Fourteenth Amendment of the UNITED STATES Constitution. However, the Oklahoma Supreme Court has long held that there is a right to a predeprivation hearing in eminent domain cases under the OKLAHOMA Constitution.

Willis' equal protection claim and unjust enrichment claim are based on the theory that PSO is violating Willis' right to equal protection of the law by continuing to appropriate the use of Willis' property under color of state law after the Oklahoma Supreme Court held in PSO v. Willis, 941 P.2d 995 (Ok. 1997) (see Appendix E at 27a) that PSO's

appropriation of Willis' property prior to a meaningful predeprivation hearing violated Willis' rights under the Oklahoma constitution.

Ironically, the U.S. District Court's ruling in the previous case stated:

> Second, Willis relies on Oklahoma cases, Wrightsman v. Southwestern Natural Gas Co., 46 P.2d 925 (Okla. 1935) and Town of Ames v. Wybrant, 220 P.2d 693 (Okla. 1950), holding that **the land owner has a constitutional right to a hearing before deprivation.** (emphasis added) (App. D at 25a).

Both the District Court and the Court of Appeals have ruled against Willis by simply ignoring the decisions of the Oklahoma Supreme Court concerning state eminent domain law and brazenly asserting 66 0.S. §53(c) permits PSO to take possession of Willis' property without a predeprivation hearing on public use.

It is a bed rock principle of American jurisprudence that Federal Courts must follow state law as pronounced by the State Supreme Court. Erie Railroad v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, (1938). Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543, 61 S.Ct. 347, (1941).

Until the case at bar, the decisions of the Tenth Circuit were entirely consistent with this requirement. In Chicago Rock Island & Pacific R.R. v. Hugh Breeding, Inc., 247 F.2d 217 (10th Cir. 1957), the Court held:

> "And where, as in the instant case, the question decided was one of state law, with respect to which the federal courts are bound to follow the decisions of the courts of the state, and where subsequent to the decision of the federal court, the supreme court of the state has rendered a decision at variance with that of the federal court, it is the duty of the federal court that still has jurisdiction of the case to conform its decision and judgment to the latest decision of the supreme court of the state."

This Court in addressing rights under state eminent domain law stated:

> With respect to such rights, **we have held the law of the State as declared by its Supreme Court is controlling...** (Emphasis added) Kaukauna Water Power Company v. Green Bay and Mississippi Canal Company, 142 U.S. 254, 12 S.Ct. 173, 177 (1891)

Oklahoma eminent domain law is based on three (3) sources of law, the Oklahoma Constitution, the Oklahoma Statutes at 66 O.S. ¶51 et. seq. and the decisions of the Oklahoma Supreme Court interpreting the Constitution and statutes.

The Oklahoma eminent domain statutes are essentially unchanged from when they were first enacted by the territorial legislature in 1890. With respect to the rights of landowners the statutes only address the right to compensation.

While the statutes do not address a landowner having a right to a predeprivation hearing on the public use of a proposed taking, over the years the Oklahoma Supreme Court by judicial construction has established procedures in eminent domain proceedings to permit a landowner to challenge the taking of land by a condemnor. In Wrightsman v. Southwestern Natural Gas Co., 46 P.2d 925, 932 (Okl. 1935) the Oklahoma Supreme Court noted, "...the power to determine questions relating to the right to condemn in condemnation proceedings arises in this state from judicial construction rather than specific statutory authority." As a result, in terms of Oklahoma eminent domain law the statutes are merely "the tip of the iceberg."

The Oklahoma Supreme Court reiterated many of its earlier holdings concerning the rights of landowners in its decision in PSO v. Willis, supra. In the opening paragraph the Supreme Court held:

> Certiorari was granted in this eminent domain proceeding to consider a landowner's contention that his constitutional and statutory rights were violated as he was denied any meaningful opportunity for a hearing before Public Service Company was allowed to...take possession of his land. We agree. App. E at 29a, ¶1.

In fact, 66 O.S. §53(c), the statute cited in the Panel decision is irrelevant to Willis §1983 claims. In Town of Ames v. Wybrandt, 220 P.2d 693 (Okl. 1950), the Oklahoma Supreme Court specifically addressed §53(c) and held that it and the cases construing it did not apply when the right to take was at issue.

When the Town of Ames, supra, was handed down in 1950, by law in Oklahoma, 10 O.S. §977 provided that the Supreme Court must prepare and file a syllabus of the points of law decided in any case. The statute, which was repealed as of January 13, 1969, was as follows:

> "977. Syllabus
>
> A syllabus in any case in the Supreme Court shall be stated, in writing, by the justice delivering the opinion of the court and filed with the papers of the case, which shall be confined to the points of law arising from the facts in the case, that have been determined by the Court."

The Tenth Circuit Court of Appeals has recognized and held that "syllabus is the law of the case in Oklahoma." Sampson Construction Co., Inc. v. Farmers Coop El. Co., Marshall, Okla., 382 F.2d 645, 648 (10 Cir. Okl. 1967). Syllabus adopted by the Oklahoma Supreme Court is the law of the State of Oklahoma until overruled. Hartford Acc. & Indem. Co. v. First Nat Bk., & Tr. Co. of Tulsa, 287 F.2d 69, 73 (10 Cir. Okl. 1961). The Town of Ames opinion sets forth four syllabi written by the Oklahoma Supreme Court, the fourth of which is as follows:

> "4. In a condemnation proceeding where the right to condemn is properly in issue it would be a denial of equal protection of the laws to authorize possession before there has been a determination of the right to condemn."

This holding, " **part of the law of the state**," merely repeated what the Oklahoma Supreme Court had declared fifteen years earlier:

> Manifestly, cases might arise where possession by the condemnor would be tantamount to destruction as far as the landowner is concerned. In such cases, denial of a tribunal in which to test the right to condemn prior to possession, would be a denial of equal protection of the laws. Wrightsman v. Southwestern Natural Gas Company, 46 P.2d 925, 929 (Ok. 1935)

In Town of Ames v. Wybrandt, supra at 695, the Oklahoma Supreme Court held:

> "Therefore, the establishment of the right to condemn is a **PREREQUISITE TO ANY RIGHT OF POSSESSION** by the condemnor." (Emphasis added)

As the Oklahoma Supreme Court held in PSO v. Willis, supra:

> "Before an entity having eminent domain authority can appropriate private land to its use, **ALL THE STEPS LEGALLY REQUISITE MUST HAVE BEEN TAKEN**."..."Willis is correct. He was wrongfully denied an opportunity to challenge PSO's asserted but **UNPROVEN RIGHT TO TAKE** his property as well as the right to conduct discovery." (Emphasis added) App. E

at 36a, 37a, ¶¶17, 21.

Obviously, if PSO failed to prove its right to take Willis' property all of the steps legally requisite were not taken, and PSO has no right to appropriate the use of the property.

Indeed, in a later decision in the same case the intermediate Oklahoma Court of Civil Appeals explicitly stated:

> In June, 1997, the Oklahoma Supreme Court issued an opinion on certiorari to review this court's 1995 opinion. The Supreme Court held that Owner was entitled to discovery and a meaningful opportunity for hearing **before PSO could** condemn and **occupy the property**...(Emphasis added) App. F at 40a.

So well developed is Oklahoma case law in this area that over 80 years ago the Oklahoma Supreme Court held:

> "Section 24, Art. 2 of the Constitution, prescribes in general the method of condemnation and must be strictly observed when the right of eminent domain is invoked. The section reads:
> `...In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.'
> It would follow that any attempt...to appropriate private land...contrary to such constitutional provision would be **VOID though under the color of statutory authority.**" (emphasis added) Watkins v.

Board of Commissioners, 174 P. 523, 524 (Okl. 1918)

Even the U.S. District Court has explicitly conceded in the first case:

> The holding of the Supreme Court of Oklahoma establishes that the actions of the district court were in violation of Okla. Const., ¶¶23, 24 and Okla. Stat. tit. 66, ¶53. The decision did not involve the constitutionality of Okla. Stat. tit. 66, ¶53. It addressed the failure of the lower courts to follow the established statutory process. App. C at 17a.

Since the Oklahoma Supreme Court has held that PSO's appropriation of Willis' property without a meaningful hearing to adjudicate the public use of the taking violated Willis' "constitutional and statutory rights", the Tenth Circuit was clearly refusing to follow state law as pronounced by the Oklahoma Supreme Court when the Court of Appeals held that Willis did not have an equal protection claim because PSO was lawfully in possession of Willis' property under Oklahoma eminent domain law.

This in turn establishes that the decision of the Court of Appeals is in violation of the decisions of this Court that federal courts must conform their decisions regarding state law to the latest decision of the highest court of the state-PSO v. Willis, supra.

ARGUMENT 2

The dismissal of Willis' freedom of speech claim was based on a blatant misstatement of Oklahoma law.

The Court of Appeals affirmed the dismissal of Willis' First Amendment Freedom of Speech claim under the purported authority of United States v. O'Brien, 391 U.S. 367 (1968). (App. A at 5a, 6a).

Willis alleged that its First Amendment right to freedom of speech was violated by having Willis bound over for trial for having Willis' attorney fax a letter to Burlington Northern's attorney.

The Court of Appeals theory was that Willis' action which allegedly violated the injunction contained both speech and non-speech elements because Willis' action constituted "harassment" of Burlington Northern in the exercise of its right to operate trains across Willis' property.

The Court stated:

> Burlington Northern, as PSO's licensee, **had a statutory right to use the easement** pending final determination of the just compensation question. See Okla.Stat.tit. 66, ¶53(c). This right is an important and substantial governmental interest...
>
> The governmental interest in keeping roadways in use and in preventing harassment of those who must use them is unrelated to the suppression of free

> expression...Where the court has entered an injunction to protect a party from harassment and interference **with the exercise of his rights**, the First Amendment will not operate as an excuse for harassing behavior. (App. A at 6a, 7a) (emphasis added).

These assertions reflect a complete refusal to follow Oklahoma eminent domain law as pronounced by the Oklahoma Supreme Court. As shown in the previous argument, the Oklahoma Supreme Court has held that 66 O.S. §53(c) and the cases construing it do not apply when the right to condemn property is at issue. Town of Ames v. Wybrandt, supra. The Oklahoma Supreme Court specifically held in the fourth syllabus:

> "4. In a condemnation proceeding where the right to condemn is properly in issue it would be a denial of equal protection of the laws to authorize possession before there has been a determination of the right to condemn."

This holding is "part of the law of the state" Hartford Acc. & Indem. Co. v. First National Bank and Trust Co. of Tulsa, supra.

In footnote 2 of its opinion, the Court of Appeals asserts, "The Oklahoma Supreme Court did not decide the issue of use of the easement in Plaintiff's favor." (App. A at 4a). This assertion is utterly false.

Under Oklahoma law an "easement" is the right of one person to go onto the land of another and make limited use thereof. Story v. Hefner, 540 P.2d 562, 566 (Okl. 1975). The Oklahoma Supreme Court held in PSO v. Willis, supra, that:

1. Before an entity having eminent domain can appropriate private property to its use all the steps legally requisite must have been taken. (App E at 36a, ¶17).

2. PSO has asserted but never proven its right to take Willis' property. (App. E at 37a, ¶21).

3. PSO's appropriation of Willis' property is in violation of Willis' constitutional rights. (App. E at 29a, ¶1).

In other words, **there is no easement across Willis' property.**

The issue of PSO's right to possess and use Willis' property was clearly before the Oklahoma Supreme Court in PSO v. Willis, supra.

In ¶1 the Court stated:

> Certiorari was granted in this eminent domain case to consider a landowner's contention that his Constitutional and statutory rights were violated as he was denied any meaningful opportunity for

> a hearing before Public Service Company was allowed to exercise its asserted right to condemn and **take possession of his land**. We agree. (App. E at 29a) (emphasis added)

In ¶6 the Court stated:

> Willis appealed. He argued that by allowing PSO **to seize his property**...the District Court had ignored his Constitutional and statutory rights, as well as those protected by clear and well developed case law. Willis contended that the trial court committed error by...holding that a mere unsubstantiated allegation in a petition, unsupported by any evidence whatsoever, was sufficient to entitle PSO, acting under the sovereign power of eminent domain, **to take his property**. (App. E at 31a). (emphasis added)

In ¶8 the Court held:

> On certiorari, Willis points out that the combined result of the actions of the trial court and the Court of Civil Appeals has been to deny him all opportunity to present any defense to PSO's action **to take his property** over his protests. (App. E at 32a) (emphasis added)

Clearly, Willis was appealing PSO's right to be in possession of its property. In fact, PSO's own attorney stated to the U.S. District Court as follows:

> "Now, of course, Your Honor is aware that that Supreme Court - that the Supreme Court has this entire matter on appeal before it now on Application for Certiorari, but hasn't been accepted concerning both sides.
>
> THE COURT: On the issue of the validity of the taking on all issues related to the orders issued by Judge Goodpaster.
>
> MR. HIX. Yes, Your Honor.
>
> The defendant has - excuse me, the plaintiff has made the argument in the Oklahoma Supreme Court that Public Service Company **COULD NOT TAKE THIS PROPERTY, COULD NOT POSSESS THIS PROPERTY** absent a certificate from its Board of Directors, a resolution of its Board of Directors stating a public need. Now, that's something the Court of Appeals disagreed with in its decision. But that - and, therefore, **THE VALIDITY OF PSO'S POSSESSION OF THE PROPERTY IS BEFORE THE**

OKLAHOMA SUPREME COURT.[4]

Since PSO has no easement across Willis' property PSO obviously could not license BN to use an easement that does not exist. As a result, under Oklahoma law BN is nothing more than a trespasser. Allen v. Transok Pipeline Company, 552 P.2d 375 (Okl. 1976).

This in turn establishes that Willis was not engaged in harassment and interference with the exercise of BN's rights when Willis demanded that BN stop its recurring unlawful invasions of Willis' property. As a result, the Court of Appeals assertion that such demands were not protected speech completely fails.

In 1959, this Court held:

> Against this background two protections emerge from the broad constitutional proscription of official invasion. The first of these is...the right to shut the door on officials of the state unless their entry is under proper authority of law. Frank v. State of Maryland, 359 U.S. 360, 365, 79 S.Ct. 804, 808, (1959).

Justice Frankfurter, who wrote the majority opinion in Frank, wrote a dissenting opinion where he cited to Frank in

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[4] Transcript of Oral Argument before U.S. District Court October 2, 1996, P.10 , Ln. 18-P.11, Ln. 9. (emphasis added)

Monroe v. Pape, 365 U.S. at 209, 81 S.Ct. at 496:

> The essence of the liberty protected by the common law and by the American constitutions was "the right to shut the door on officials of the state unless their entry is under proper authority of law."

The decisions of the Oklahoma Supreme Court in PSO v. Willis, supra, and Allen v. Transok Pipeline Company, supra, establish that BN's recurring invasions of Willis' property are not under proper authority of law.

On two occasions, Willis has notified BN that Willis intended to exercise the constitutional right to shut the door on these unlawful invasions by restoring the fence line around the property. However, Willis has never made any attempt to actually do so.

Nonetheless, PSO seeks to have Willis incarcerated in the Rogers County jail for six (6) months merely for asserting to BN that PSO had failed to obtain an easement across Willis' property leaving BN as a trespasser and that Willis intended to put a stop to BN's recurring trespass.

This Court stated almost 60 years ago:

> The freedom of speech...guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matter of public concern without previous restraint or fear of subsequent punishment...The

> safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of these means of advancing public knowledge may **persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute.** Every expression of opinion on matters that are important has the potentiality of inducing action in the interest of one rather than another group in society. **But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interest.**
>
> Thornhill v. State of Alabama, 60 S.Ct. 736, 744, 745, 310 U.S. 88, 101, 104, (1940). (emphasis added)

This is precisely the situation present in the case at bar. The group in power has subverted a state district court to obtain an unconstitutional order and seized a citizen's property in flagrant violation of state eminent domain law as well as federal constitutional requirements pronounced by this Court. After Willis obtained a state supreme court decision reversing the order PSO had knowingly obtained in flagrant violation of state eminent domain law on the grounds PSO and

the subverted state district court had violated Willis' constitutional and statutory rights, the "group in power" simply ignored the decision of the state supreme court and continued to violate Willis' constitutional rights. When Willis did nothing more than have its attorney send a demand letter to BN's attorney the group in power responded by initiating court proceedings to have Willis put in jail for merely asserting an intention to exercise constitutional rights.

If the group in power can silence its opponents by locking them up for writing letters after the state supreme court has held that the group in power is violating the constitutional rights of those opponents, the First Amendment will have been rendered meaningless.

As Willis has argued to every court in this litigation, "Ultimately, the fundamental issue in this case is whether the Constitution of the United States applies in Rogers County, Oklahoma.

CONCLUSION

The Court of Appeals' decision in this case directly contradicts the holdings of this Court in numerous cases cited herein and blatantly misstates Oklahoma eminent domain law as pronounced by the Oklahoma Supreme Court.

The Petition for a Writ of Certiorari should be granted. Otherwise, the precedential value of this Court's decisions will be called into question and the principle that all citizens stand equal before the law will have been severely compromised.

/s/_____

William T. Dickson
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918-234-5111

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed: July 20, 1999]

No. 98-5122

B. WILLIS, C.P.A., INC., BUCK WILLIS,
Plaintiff-Appellant,

v.

JAMES D. GOODPASTER, sued as: The Honorable James D. Goodpaster; PUBLIC SERVICE COMPANY OF OKLAHOMA; JOHN DOE, sued as: John Doe 1-100,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA (D.C. No. 97-CV-1083)

Submitted on the briefs:

William T. Dickson, Tulsa, Oklahoma, for Plaintiffs-Appellants.

Richard P. Hix and Jon E. Brightmire, of Doerner, Saunders, Daniel & Anderson, L.L.P. Tulsa, Oklahoma, Stratton Taylor, of Taylor, Burrage, Foster, Singhal & Mallett, Claremore, Oklahoma, for Defendants-Appellees.

Before **PORFILIO, McKAY**, and **LUCERO**, Circuit Judges.

PORFILIO, Circuit Judge.

Plaintiffs-appellants B. Willis, C.P.A., Inc. and Buck Willis appeal from the district court's order dismissing their complaint against the Honorable James D. Goodpaster and Public Service Company of Oklahoma (PSO). We affirm.[1]

The underlying facts are set out in more detail in our recent decision in Willis's related appeal. See B. Willis, C.P.A., Inc. v. Public Serv. Co., No. 97-5107, 1999 WL 335207 (10th Cir. May 28, 1999). PSO pursued an eminent domain proceeding to condemn and acquire an easement over plaintiffs' property. Willis challenged the eminent domain proceeding in state court, and ultimately obtained a reversal of the judgment of condemnation and a remand for further proceedings from the Oklahoma Supreme Court. See Public

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[1] After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Serv. Co. v. B. Willis, C.P.A., Inc., 941 P.2d 995 (Okla. 1997).

While Willis's appeal was pending, PSO completed a railroad spur over the easement and put it in use. It licensed the Burlington Northern and Santa Fe Railroad Company (Burlington Northern) to use the spur. On April 3, 1995, Judge Goodpaster entered an injunction prohibiting Willis from directly or indirectly interfering with the operation of PSO's railroad spur. This injunction remains in effect, in spite of plaintiffs' attempts in the state courts to obtain its dissolution.

After the Oklahoma Supreme Court ruled in Willis's favor, his attorney sent a letter to the attorney for Burlington Northern. In the letter, he warned Burlington Northern not to attempt to cross plaintiffs' property until obtaining a license agreement. He further notified Burlington Northern that plaintiffs would restore their fence line around the property and would post "no trespassing" signs. PSO filed an application for contempt of court based upon the letter. It does not appear that the contempt of court proceeding has yet been resolved in state court.

Plaintiffs thereafter brought this action in federal district court, asserting claims against Judge Goodpaster and PSO for denial of equal protection, denial of their right to free speech, unjust enrichment, malicious prosecution, and abuse of process. We review the district court's dismissal of plaintiffs' complaint de novo. See Ordinance 59 Ass'n v. United States Dep't of Interior Secretary, 163 F.3d 1150, 1152 (10th Cir. 1998). We will uphold the dismissal only if,

accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to plaintiffs, it appears that they can prove no set of facts in support of their claims which would entitle them to relief. See Southern Disposal, Inc. v. Texas Waste Mgm't, 161 F.3d 1259, 1262 (10th Cir. 1998).

First Amendment claim

The district court's order does not discuss its reasons for dismissing plaintiffs' First Amendment claim.[2] Plaintiffs complain that the contempt citation violated their First Amendment rights.

In their complaint, plaintiffs stated their claim as follows:

> By prosecuting a Contempt of Court action and having Willis bound over for trial on September 25, 1997, for writing a letter PSO . . . and Judge Goodpaster have violated Willis' federally protected right to freedom of speech as guaranteed by the First Amendment to the constitution of the United States.

---

[2] As an initial matter, plaintiffs argue that the Oklahoma Supreme Court's decision in their favor makes the injunction against them a nullity. We disagree; the Oklahoma Supreme Court did not decide the issue of use of the easement in plaintiffs' favor. Moreover, that court rejected plaintiffs' attempts to vacate the challenged injunction.

Appellants' App. at 7.

Plaintiffs' complaint recites that the injunction which they are charged with violating prohibited them "from directly or indirectly interfering in any manner with the construction, maintenance and operation of [PSO]'s railroad spur." Id. at 7, 56. This injunction "plainly does not abridge free speech on its face." United States v. O'Brien, 391 U.S. 367, 375 (1968). It is directed at conduct-interference with the operation of the railroad spur-rather than speech. See id.

Plaintiffs contend, however, that the injunction violated their First Amendment rights as it was applied to them. We begin by noting that plaintiffs' action of sending a letter to Burlington Northern contained both speech and non-speech elements. The letter was a form of action or conduct as well as advocacy, and it was therefore not entitled to full First Amendment protection. Cf. Healy v. James, 408 U.S. 169, 192 (1972); Appeal of Stann (In re Andrus), 189 B.R. 413, 416 (N.D. Ill. 1995) (holding creditor's actions in posting signs identifying debtor as deadbeat and harassing debtor with threatening telephone calls and in-person statements should be analyzed as conduct rather than pure speech).

Since the injunction was conduct-based and the action by which plaintiffs allegedly violated it contained both speech and non-speech elements, we review the constitutional issue under the O'Brien test. Under this test, we ask whether the injunction

> is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

See O'Brien, 391 U.S. at 377.

The answer to all of these questions clearly is "yes." The power of eminent domain is contained in the Oklahoma Constitution. See Okla. Const. Art. 2, § 24. Burlington Northern, as PSO's licensee, had a statutory right to use the easement pending final determination of the just compensation question. See Okla. Stat. tit. 66, § 53(C). This right is an important and substantial governmental interest. It would become meaningless if it could not be judicially enforced, however.

The governmental interest in keeping roadways in use and in preventing harassment of those who must use them is unrelated to the suppression of free expression. The injunction's effect on freedom of speech is minimal. It prohibits only that speech or conduct which actually interferes with the operation of the railroad spur. We conclude that the challenged injunction and contempt citation pass constitutional muster.

Our decision is supported by numerous authorities concerning the parameters of the First Amendment right of advocacy. It is without question that courts may sanction parties and their attorneys who engage in harassment of their opponents. See Carroll v. Jaques Admiralty Law Firm, P.C., 110 F. 3d 290, 294 (5th Cir. 1997). The First Amendment does not shield improper tactics used by litigants to advance their interests, even if those tactics involve communication of a message. See, e.g., United States v. Fulbright, 105 F.3d 443, 452 (9th Cir. 1997) (rejecting First Amendment challenge to obstruction of justice statute where litigant seeking bankruptcy protection mailed a "notice" to judge charging him with crimes and filed a "citizens' arrest warrant" with the bankruptcy court); cf. Zal v. Steppe, 968 F.2d 924, 927-29 (9th Cir. 1992) (upholding, against First Amendment challenge, contempt citation against attorney defending abortion providers, though prohibited from doing so by an order in limine). Where the court has entered an injunction to protect a party from harassment and interference with the exercise of his rights, the First Amendment will not operate as an excuse for harassing behavior. Cf., e.g., Appeal of Stann, 189 B.R. 413 (rejecting First Amendment challenge to contempt citation against creditor who violated injunction against debt collection efforts by harassing debtor with signs accusing him of being a "deadbeat" and by verbally haranguing and threatening him concerning the debt).

Plaintiffs have failed to state a claim for violation of their First Amendment rights.[3] The district court properly dismissed their First Amendment claim.

Remaining claims

Having conducted a careful de novo review of the dismissal of plaintiffs' remaining claims, we conclude that they were properly dismissed, for substantially the same reasons stated in the district court's order of June 4, 1998.

The judgment of the Untied States District Court for the Northern District of Oklahoma is therefore AFFIRMED.

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[3] The text of plaintiff's counsel's letter, which appears in the record on appeal, bolsters our analysis. The letter did more than merely express or advocate plaintiffs' position. It warned Burlington Northern not to cross plaintiffs' property without negotiating a license agreement and threatened Burlington Northern with interference with its rail service.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed: June 3, 1998]

No. 97-1083-E

B. WILLIS, C.P.A., INC., and BUCK WILLIS,
Plaintiffs,

v.

THE HONORABLE JAMES D. GOODPASTER, PUBLIC SERVICE COMPANY OF OKLAHOMA, and JOHN DOES 1-100,
Defendants.

ORDER

Now before the Court is the Motion to Dismiss, or, In the Alternative, Motion for Summary Judgement (Docket #11) of the Defendants The Honorable James D. Goodpaster and Public Service Company of Oklahoma ("PSO").

Oklahoma District Court
Order - June 3, 1998

Plaintiffs B. Willis C.P.A., Inc. and Buck Willis have brought this action, claiming that defendants have violated Willis's federally-protected rights to equal protection and freedom of speech, that PSO is being unjustly enriched, and that PSO's bringing of contempt charges in state court constitutes both malicious prosecution and abuse of process. This case arises out of a condemnation action which is taking place in state court, in Rogers county. On October 28, 1992, PSO initiated a condemnation action seeking to take a perpetual easement and right of way for a single track industrial railroad spur tract which would cover property owned by Plaintiff in this action, B. Willis, C.P.A., Inc. (Willis). Commissioners were appointed, and a Report of the Commissioners was filed on December 28, 1992. Willis objected to the Report of the Commissioners, claiming that the taking by PSO was not necessary for a public use or purpose, and contesting the value place on the property. Subsequently, a hearing was held in state court. Willis denies that the hearing afforded him a meaningful opportunity to litigate the right to take, and argues that the hearing was instead for the purpose of arguing a motion to compel he had filed attempting to secure certain documents from PSO. After that hearing, on March 8, 1994 the court overruled the pending discovery motions as well as Willis' exceptions to the Report. Willis perfected an appeal to the Court of Appeals, which held, on March 21, 1995, that the act of filing the petition raised a rebuttable presumption that the condemnation was necessary for a public use, but that the landowner was entitled to rebut that presumption. The Court of Appeals, on March 21, 1995, held that Willis was not given a proper opportunity to rebut the presumption, and remanded in order to give Willis an opportunity to do so. Both parties filed

Petitions for Certiorari with the Oklahoma Supreme Court.

Shortly after the trial court overruled Willis' exceptions, PSO began construction on the railroad spur, and construction was completed on March 1, 1995. During the construction of the spur, Willis sought extraordinary relief, and a stay of the district court' decision, from the Supreme Court, which was denied on June 21, 1994. After the spur was completed, and the Court of Appeals had ruled, Willis demanded that PSO cease use of the railroad line. PSO sought an injunction and temporary restraining order in district court. On May 2, 1995, after a hearing, an injunction was entered, restraining Willis from "directly or indirectly interfering in any manner with the construction, maintenance and operation of (PSO's) railroad spur. . . ."

Willis responded by filing an action in federal court for trespass against Burlington Northern (BN), due to BN running a coal train over the 1069 feet of standard railroad track that lies on his property, and an action against PSO and BN for trespass and violation of civil rights. This Court concluded that all of plaintiff's claims hinged on the constitutionality of Okla.Stat.tit. 66, §53(c)[1], and found that the statute was constitutional, and that use of the track pending the outcome of the condemnation proceeding was

---

[1] Okla.Stat.tit. 66, §53(c) provided: And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.

proper.

The issues presented in this case arose when the Oklahoma Supreme Court ruled in the state court condemnation case that PSO had not submitted sufficient evidence for the district court to conclude that the proposed taking was for a public use and was reasonably necessary. The Supreme Court then remanded for further proceedings consistent with its Opinion. Willis once more sent a letter requesting that PSO refrain from using the track across its property, and PSO, after pointing out that this request was in violation of the restraining order, filed an Application for Contempt Citation. Willis responded to the Application for Contempt Citation by filing an Application to Assume Original Jurisdiction and Petition for Writ of Prohibition with the Oklahoma Supreme Court. That Application was denied, and shortly thereafter Willis filed this action for violation of his constitutional rights, unjust enrichment, malicious prosecution, and abuse of process. Along with his Complaint, Willis filed a Motion for Preliminary Injunction enjoining defendants from prosecuting the Contempt Application and using the property which was the subject of condemnation proceedings in Rogers County. Both the issue of the preliminary injunction and the Motion to Dismiss/Motion for Summary Judgment on plaintiffs' claims have been fully briefed, as has plaintiffs' Counter Motion for Summary Judgment. Because the issues of the preliminary injunction will be moot if the motion to dismiss is granted, the Court will first consider the motion to dismiss.

Willis' Equal Protection Claim

PSO first argues that Willis cannot establish a violation of his rights by PSO's use of the property because PSO's statutory right to possession has been established by the state district court and by this court. PSO asserts that the issue in this case has already been determined in the previous federal lawsuit, and that Willis is collaterally estopped from raising that same issued again. Willis argues that Okla.Stat.tit.66, §53(c) is irrelevant to his claim and that the decision of this court in the related cases does not in any way preclude his current claim.

The key question is whether this court's ruling in the previous case necessarily precluded Willis' present claim that his right to equal protection of the laws has been violated by appropriation of his property prior to a meaningful hearing. This Court must conclude, that, in light of its previous ruling, that Okla.Stat.tit.66, §53 (c), which allows possession of the property in certain instances, is constitutional, and that he does not have a right to a hearing prior to taking a possessory interest in his land, Willis does not have an equal protection claim. Because of the Court's conclusion regarding the equal protection claim and the effect of its previous ruling, the unjust enrichment claim must also be dismissed.

Malicious Prosecution and Abuse of Process

Willis brings a claim for malicious prosecution, asserting in his complaint, that "the acts of PSO . . . in bringing a contempt of court proceeding against Willis constitute the tort of malicious prosecution." Willis

apparently abandons that claim in his response to PSO's Motion to Dismiss, arguing instead that the malicious prosecution comes from the pursuit of injunctive relief on April 3, 1995. In either event Willis" malicious prosecution claim is, at best, premature.

The parties essentially agree on the elements necessary to prove an action for malicious prosecution: 1) the bringing of an action by defendant; 2) a successful conclusion in favor of plaintiff; 3) lack of probable cause; 4) malice; and 5) damages. Parker v. City of Midwest City, 850 P.2d 1065, 1067 (Okla. 1993). Regardless of whether plaintiff's claim is based on the action for injunctive relief or the contempt proceeding, it is inescapable that there has been no "successful conclusion in favor of plaintiff." Plaintiff's claim for malicious prosecution is dismissed.

Likewise, the claim for Abuse of Process must be dismissed. Again the parties agree on the elements of the claim: 1) improper use of process; 2) primarily for an ulterior purpose; and 3) damages to plaintiff. Greenburg v. Wolfburg, 890 P. 2d 895, 905 (Okla. 1994). Abuse of process does not lie even if an action was motivated by a bad intention if the "court's process is used legitimately to its authorized conclusion." Id. The gravamen of an abuse of process claim is "perversion of the process after it is issued." Greenburg, 890 P.2d at 906. The intention of PSO therefore in obtaining the contempt citation, as alleged in the petition, is not sufficient to support an abuse of process claim.

Oklahoma District Court
Order - June 3, 1998

Defendant's Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment (Docket #11) is granted.

Dated this 3rd day of June, 1998.

/s/_____
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed: November 3, 1997]

Case No. 96-C-59-E
(Consolidated with
Case No. 96-C-172-E)

B. Willis, C.P.A., Inc.,
Plaintiff,

v.

Public Service Company of Oklahoma,
an Oklahoma Corporation, and
Burlington Northern Railroad Company,
a foreign corporation:
Defendants.

ORDER

Entered: November 4, 1997

The Court, upon consideration of plaintiff's Motion filed under Authority of Fed. R.Civ. P. 60(b) to Vacate the Order Dated April 8, 1997, and the Judgment Dated May 13, 1997 (Docket #78), and upon consideration of the briefs and

arguments of the parties submitted upon the issues raised enters the following Order:

It is Ordered that plaintiff's 60(b) motion is denied. Plaintiff urges that this Court's ruling was based on a mistake of law, which law was substantially clarified on June 24, 1997 by the Supreme Court of the State of Oklahoma in its opinion in Public Service Company of Oklahoma v. B. Willis, C.P.A., Inc., No. 83,358. Plaintiff's position would have merit if the issues raised, presented, and addressed by the Supreme Court of Oklahoma were the same as the issues this Court addressed in its judgment and order. They are not the same.

The key issue before this Court was whether plaintiff's constitutional rights guaranteed by the Fourteenth Amendment were infringed by the state court in the condemnation proceedings. This Court stated in its Order, "Implicit in the issue before the court is the constitutionality of Okla. Stat.tit.66, §53(a), or its application in this case. With the issue framed in this manner, the Court finds that Willis does not have a constitutional right to a hearing prior to PSO taking a possessory interest in his land."

The holding of the Supreme Court of Oklahoma establishes that the actions of the district court were in violation of Okla. Const., §§ 23, 24 and Okla. Stat.tit.66, §53. The decision did not involve the constitutionality of Okla. Stat.tit.66, §53. It addressed the failure of the lower courts to follow the established statutory process. Plaintiff has full relief available to him upon remand to the state district court.

In light of this finding, the Court declines to request of the Court of Appeals that this case be remanded for further proceedings based upon the holding of the Supreme Court of the State of Oklahoma. Plaintiff's motion to vacate (Docket #78) is denied.

IT IS SO ORDERED THIS 31ST DAY OF OCTOBER, 1997.

/s/_____
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed: April 7, 1997]

Case No. 96-C-59-E
(Consolidated with
Case No. 96-C-172-E)

B. Willis, C.P.A., Inc.,
Plaintiff,

v.

Public Service Company of Oklahoma,
an Oklahoma Corporation, and
Burlington Northern Railroad Company,
a foreign corporation:
Defendants.

ORDER

Entered: April 8, 1997

Now before the Court is the Motion to Dismiss (Docket #9 in 96-C-172-E) of the Defendant Public Service Company (PSO) in the above captioned matter.

Oklahoma District Court
Order - April 7, 1997

This case arises out of a condemnation action which is taking place in state court, in Rogers county. On October 28, 1992, PSO initiated a condemnation action seeking to take a perpetual easement and right of way for a single track industrial railroad spur tract which would cover property owned by Plaintiff in this action, B. Willis, C.P.A., Inc. (Willis). Commissioners were appointed, and a Report of the Commissioners was filed on December 28, 1992. Willis objected to the Report of the Commissioners, claiming that the taking by PSO was not necessary for a public use or purpose, and contesting the value placed on the property. Subsequently, a hearing was held in state court. Willis denies that the hearing afforded him a meaningful opportunity to litigate the right to take, and argues that the hearing was instead for the purpose of arguing a motion to compel he had filed attempting to secure certain documents from PSO. After that hearing, on March 8, 1994 the court overruled the pending discovery motions as well as Willis' exceptions to the Report. Willis perfected an appeal to the Court of Appeals, which held, on March 21, 1995, that the act of filing the petition raised a rebuttable presumption that the condemnation was necessary for a public use, but that the landowner was entitled to rebut that presumption. The Court of Appeals, on March 21, 1995, held that Willis was not given a proper opportunity to rebut the presumption, and remanded in order to give Willis an opportunity to do so. Both parties filed Petitions for Certiorari with the Oklahoma Supreme Court. Although the Petitions were granted, the Supreme Court has not yet ruled on the matter.

Shortly after the trial court overruled Willis' exceptions, PSO began construction on the railroad spur, and

construction was completed on March 1, 1995. During the construction of the spur, Willis sought extraordinary relief, and a stay of the district court' decision, from the Supreme Court, which was denied on June 21, 1994. After the spur was completed, and the Court of Appeals had ruled, Willis demanded that PSO cease use of the railroad line. PSO sought an injunction and temporary restraining order in district court. On May 2, 1995, after a hearing, an injunction was entered, restraining Willis from "directly or indirectly interfering in any manner with the construction, maintenance and operation of [PSO's] railroad spur . . . .

Willis responded by filing an action for trespass against Burlington Northern (BN), due to BN running a coal train over the 1069 feet of standard railroad track that lies on his property. Subsequently, Willis filed an action against PSO and BN for trespass' and violation of civil rights. The essence of Willis civil rights claim is that Willis was denied his civil rights when his property was taken prior to a hearing on the right to take.

The two cases were consolidated, and dispositive motions were filed by all parties. The parties agree that the facts are undisputed and that the key issue[1] is whether Willis' constitutional rights were infringed by the court's failure to afford him a hearing on the taking of his property prior to

---

[1] Claims of trespass, and that the rail spur required approval of the ICC were apparently dropped by Willis inasmuch as he failed to respond to the motion to dismiss regarding these claims. Nevertheless, the trespass claim, at least, depends on the issue to be resolved here.

PSO's taking possession of the property for purposes of building the spur. Put differently the question is whether in a condemnation action, due process requires the court to have a hearing on the right to take (if that is an issue) before the condemnor can take possession of the property. Plaintiff concedes that if his rights under the Fourteenth Amendment have not been violated, he has no standing in this court. Implicit in the issue before the court is the constitutionality of Okla.Stat.tit. 66, §53(a), or its application in this case, which provides, in pertinent part:

> And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.

With the issue framed in this manner, the Court finds that Willis does not have a constitutional right to a hearing prior to PSO taking a possessory interest in his land. The reasoning of the court in Joiner v. City of Dallas, 380 F. Supp. 754, 764-65 (N.D. Tex. 1974), aff'd 419 U.S. 1042 (1974) is persuasive:

> That the power of eminent domain must be exercised in accordance with due process of law is an explicit requirement under the Fourteenth Amendment. The perimeters of the Due Process requirement in eminent domain

> proceedings have been sharply defined through a series of Supreme Court decisions, however, and the customary "due process" attack has limited chance of success. For example, the Court has repeatedly characterized the condemnor's decision on the necessity for a taking and the quantity to be appropriated as legislative, and has, therefor, denied to landowners the right to participate in that decision-making process or to litigate of federal constitutional grounds the decision to condemn private property.
>
> * * * * *
>
> The question is purely political, does not require a hearing, and is not the subject of judicial inquiry.

Having noted this, the Joiner Court went on to reject Joiner's objection on constitutional grounds to prejudgment possession by the city. Joiner, at p. 771. The court stated:

> Any owner who believes that the condemnor is without authority to initiate condemnation proceedings or that there is no public purpose for the condemnation has two avenues of judicial review. First, by including these issues in the written objections filed in response to the Report of the Special Commissioners in condemnation, the property owner may litigate these matters in the county Court at Law with the right of appellate review of any final

> judgment. As an alternative, however, property owners may commence a simultaneous collateral injunctive action in district court.
>
> * * * * *
>
> Although plaintiffs contend in is "unconstitutional" to place the burden on property owners to request judicial review of the propriety of condemnation, they fail to substantiate this allegation with federal case law.

Joiner, at p. 771-72.

Similarly, in Government of the Virgin Islands v. 19.623 Acres of Land, 536 F.2d 566, 571 (3rd Cir. 1976), the court, relying on Joiner held that "the due process clause does not require that a landowner whose property is to be condemned be given a hearing in advance to determine whether the taking is necessary." The court in Virgin Islands specifically noted that the Supreme Court had rejected the notion that due process required a hearing on necessity of taking in Bragg v. Weaver, 251 U.S. 57, 58-59, 40 S.CT. 62, 64 L.Ed. 135 (1919). Virgin Islands, 536 F.2d at p. 570.

While Willis attempts, unsuccessfully, to distinguish Joiner, he makes two additional arguments. First, Willis relies on garnishment and replevin cases, Sniadach v. Family Finance Corp. Of Bay View, 395 U.S. 337, 89 S.Ct. 1820 (1960) and Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983,

32 L.Ed.2d 556 (1972), which hold that a property owner has a constitutional right to a hearing before his property can be taken. Joiner, however, rejects the notion that the reasoning in Sniadach can appropriately be applied to an eminent domain case. Joiner, 380 F.2d at 774.

Second, Willis relies on Oklahoma cases, Wrightsman v. Southwestern Natural Gas Co., 46 P.2d 925 (Okla. 1935) and Town of Ames v. Wybrant, 220 P.2d 693 (Okla. 1950), holding that the landowner has a constitutional right to a hearing before deprivation. These cases, however are distinguishable on their facts, and are not persuasive in light of Bragg.

Having determined that this case should be dismissed in that no federal constitutional right is implicated, the court now turns to the issue of sanctions. PSO seeks sanctions against Willis and his counsel for the filing of this Complaint asserting that it was "filed for an improper purpose: i.e., to unnecessarily and improperly commence litigation in this Court with respect to matters already pending before the Supreme Court of Oklahoma, and the District Court for Rogers County, thereby multiplying the expense of final adjudication of the parties disputes." Although Willis' claims were ultimately dismissed, the Court does not conclude that Willis "unnecessarily and improperly commenced litigation in this Court." Willis sincerely believed that he was pursuing a legitimate federal constitutional right. While this Court did not adopt Willis' position, the Court does not find that it was so lacking in merit as to warrant sanctions.

Oklahoma District Court
Order - April 7, 1997

PSO's Motion to Dismiss (Docket #9) is granted. PSO's Motion for Sanctions (Docket # 31 in 96-C-59-E) is denied.

IT IS SO ORDERED THIS 7TH DAY OF APRIL, 1997.

/s/_____
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX E

1997 OK 78

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

For Official Publication

[Filed June 24, 1997]
No. 83,358

Public Service Company of Oklahoma, an Oklahoma corporation, *Appellee*,	)
v.	)
B. Willis, C.P.A., Inc. *Appellant.*	)

CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION 4 AN APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY, OKLAHOMA, HONORABLE JAMES D. GOODPASTER, TRIAL JUDGE.

¶ 0 **Eminent domain proceeding was brought by public utility to condemn right-of-way easement across portion of landowner's property for railroad purpose. District Court granted Judgment to utility. Landowner appealed adverse rulings on his exceptions to commissioners' report and motion to compel discovery. The Court of Civil Appeals affirmed In part and reversed in part.**

CERTIORARI PREVIOUSLY GRANTED.
COURT OF CIVIL APPEALS OPINION VACATED.
DISTRICT COURT REVERSED AND CASE
REMANDED FOR FURTHER PROCEEDINGS.

Stratton Taylor
Daphne A. Burns
Carle, Higgins, Mosler & Taylor,
Claremore, Oklahoma,

Kevin Coutant
Doemer, Stuart, Saunders,
Daniel, Anderson & Blolchini,
Tulsa, Oklahoma, For Appellee,

William T. Dickson
Tulsa, Oklahoma, For Appellant.

SIMMS, J:

Oklahoma Supreme Court
Certiorari - June 24, 1997

¶1 Certiorari was granted in this eminent domain proceeding to consider a landowner's contention that his constitutional and statutory rights were violated as he was denied any meaningful opportunity for a hearing before Public Service Company was allowed to exercise its asserted right to condemn and take possession of his land. We agree. We vacate the decision of the Court of Civil Appeals, reverse the trial court and remand for further proceedings.

¶2 Public Service Company (PSO) commenced this condemnation proceeding to acquire an easement across property owned by Willis (or landowner), for the purpose of building a thirteen mile railroad spur to transport coal to its Oologah power plant. In its petition, PSO alleged that it is a public service corporation duly authorized under 66 O.S. 1991 §§ 51-60 and 27 O.S. 1991 § 7, to exercise the power of eminent domain, that its acquisition of Willis' property is necessary for a proper purpose and that its efforts to secure the right-of-way by private purchase had been unsuccessful.

¶3 Commissioners were appointed and filed their report pursuant to 66 O.S.1991, § 53. Willis filed exceptions to the commissioners' report under 66 O.S.1991; § 55, and alleged that the proposed taking of his property was not for a public use or reasonably necessary therefor and demanded a Jury trial. Additionally, Willis served PSO with requests for discovery to gather evidence in support of his assertions in an effort to defeat the proposed taking. Among those discovery requests was a request for production of documents which encompassed any resolution of necessity adopted by the Board of Directors of PSO declaring the necessity for acquiring Willis' land for a public use, and a request for all information

regarding economic studies, contracts, analyses, and negotiations regarding the project. PSO refused to produce most of the documents including those specified, and Willis subsequently filed a motion to compel discovery.

¶4 At a pretrial hearing, the trial court announced that it would grant PSO's request to hear all pending motions and objections including both the landowner's motion to compel discovery and his exceptions to the commissioner's report. Willis objected that the matter was premature for the trial court's determination at that time. He argued that his reason for filing the motion to compel was to obtain relevant evidence to present at a proper trial on his exceptions to the report so that he could support his defense that the proposed taking was neither for public use nor necessary therefor. He argued that PSO had failed to carry its initial burden of proof as to its right to condemn his properly because it had not presented any evidence in support of the allegations of its petition. Willis submitted that in the absence of introducing a resolution by its Board of Directors declaring the necessity of taking his property for a public use, the utility did not present a prima facie case and was not entitled to prevail on its petition.

¶5 PSO contended that discovery for the landowner was irrelevant. It argued that because it had a legislative grant to condemn property pursuant to 27 O.S. 1991 § 7, Willis had no right to contest its taking of his land. The trial court held in favor of PSO and overruled both Willis' motion to compel discovery and his exceptions to the commissioners' report. The court ruled that PSO was not required to file a resolution of necessity with its petition and held further that

a simple allegation of necessity in the petition was sufficient to sustain PSO's case. For this determination, the court relied on its Interpretation of the holding in *McCrady v. Western Farmers Electric Cooperative,* 323 P.2d 356 (Ok1.1958). The trial court also found that in the event a resolution of necessity were required, the issue had become moot because subsequent to the pretrial hearing, PSO had submitted a supplemental brief and attached thereto a certified copy of a resolution of necessity asserted to have been adopted by its Board of Directors.

¶6 Willis appealed. He argued that by allowing PSO to seize his property for a proported but disputed necessary public use without granting him an adversary hearing on his challenge to the taking, the district court had ignored his constitutional and statutory rights as well as those protected by clear and well-developed Oklahoma case law. Willis contended that the trial court committed error by denying him the right to conduct relevant discovery and holding that a mere unsubstantiated allegation in a petition, unsupported by any evidence whatsoever, was sufficient to entitle PSO, acting under the sovereign power of eminent domain, to take his property.

¶7 The Court of Civil Appeals affirmed the trial court in part and reversed in part. That Court did agree with Willis that the trial judge abused his discretion in denying Willis his right to conduct relevant discovery and, to that extent, it reversed the trial court and remanded the matter for a hearing on the issue of whether the intended taking was for public use. The Court of Civil Appeals agreed with the trial court that PSO was not required to file a copy of a resolution of

necessity with its petition, and it also followed the trial court's interpretation of *McCrady v. Western Farmers Electric Cooperative,* supra, and held that a resolution declaring the necessity of the taking was unnecessary because the mere act of filing a petition which alleges the necessity of the taking, "raises a rebuttable presumption that the condemnation is necessary for public good." The Appeals Court held that at the hearing before the trial court on remand, Willis would accordingly bear the burden of proof to rebut a presumption in favor of PSO that the taking is necessary for a public purpose.

¶8 On certiorari, Willis points out that the combined result of the actions of the trial court and the Court of Civil Appeals has been to deny him all opportunity to present any defense to PSO's action to take his property over his protests. PSO has put on no proof whatsoever in support of its petition and none will be required at the hearing on remand before the trial court, as the Court of Civil Appeals has placed the burden of proof on him rather than the condemning authority where it should be, all in violation of Okla. Const. 2 §§ 23, 24 and 66 O.S. 1991 §§ 53, et seq.

¶9 PSO also sought certiorari, contending that the portions of the Court of Civil Appeals' decision allowing Willis' discovery requests and holding that the adversarial heading before the trial court had not been adequate in all respects were erroneous. Certiorari was previously granted to both parties, however, we do not find PSO's arguments persuasive and deny the utility all requested relief.

¶10 Landowner Willis is correct that both the trial court and the Court of Civil Appeals erred in holding that by merely filing a petition for condemnation, PSO established a prima facie case and is thereby entitled to a rebuttable presumption of the necessity of acquiring Willis' property for public use. The trial court and the Court of Civil Appeals misunderstood the holding of *McCrady v. Western Farmers Electric Cooperative*, supra, for that decision does not support the rulings in this case.

¶11 In *McCrady,* one of the specific propositions of error raised by defendant landowners was that plaintiff's petitions were insufficient to invoke the court's jurisdiction because they did not allege that a resolution of necessity for condemnation had been adopted by the appropriate body. In answer to that proposition, the Court found that the petitions before it were sufficient to initiate the actions without such allegations. Because the applicable statutes governing the exercise of the power of eminent domain do not explicitly set forth any particular requirements for a pleading invoking the court's jurisdiction, the Court found certain requirements were implicit. Namely, that the petition disclose that the party seeking condemnation is authorized to exercise such power and that he has been unable to make a voluntary purchase of the property. The specific property sought to be condemned and the owner of that property should be alleged. Further, the Court held, it should appear that the specific property sought to be taken is necessary for the purpose for which the power of condemnation may be exercised. *McCrady* at 359.

¶12 The Court in *McCrady* found that the petitions at issue met those general requirements and were therefore legally sufficient. It was in this context of determining the legal sufficiency of the petitions that the Court ruled that a 'simple allegation' of necessity should be sufficient and that a specific allegation that a resolution of necessity for condemnation had been adopted by the appropriate body was not required. The Court did note there that where a resolution of necessity for condemnation has been adopted by the appropriate body, that determination is legislative in character and the factors overcoming that determination are for the defendant to assert.

¶13 Willis points out that the holding in *McCrady* is irrelevant to the issues in this case because it was not the sufficiency of PSO's petition which he challenged, but rather the lack of evidence presented in support of that petition at the hearing on his exceptions to the Commissioner's report concerning the necessity and purpose of the taking. We agree.

¶14 The mere filing of a petition does not establish a prima facie case. It is well-settled that the condemnor has the initial burden of proof on the issues in a condemnation proceeding and meets that burden to the extent of making a prima facie case of necessity by introduction into evidence of a resolution of necessity from the condemning authority, whereupon the burden of proof shifts to condemnee to show that the taking is not necessary. Rueb v. Oklahoma City, 435 P.2d 139 (Okl.1967); Bush v. Oklahoma City, 154 P.2d 960 (Okl. 1944); Lansden v. Bear, Falls and Coon Creek W&S Con. District #4, 370 P.2d 754 (Ok1.1962); Oklahoma Gas and Electric Company v. Chez, 527 P.2d 165 (Ok1.1974).

¶15 PSO never attempted to have its resolution admitted into evidence by the trial court. It simply attached the resolution to a supplemental brief. Willis, therefore, had no opportunity to challenge its authenticity under 12 O.S. 1991 §§3002, 3003, or present any other objections to the trial court regarding the purposed resolution. Nonetheless, in ruling in favor of PSO, both the trial court and the Court of Civil Appeals, have considered the resolution supportive of PSO's petition, assuming its authenticity and admissibility without comment. Willis was unable to challenge the resolution's introduction into evidence and consideration by the trial court and instead, has been forced to raise those various objections for the first time to the appellate court.

¶16 Condemnation is a proceeding strictly controlled by the constitution and statutes and must be carded out in accordance with specific procedures prescribed by the legislature. Constitutional and statutory provisions relating to eminent domain must be strictly construed in favor of landowner and against the condemning party. *Carter v. Oklahoma City, 1993 OK 134,* 862 P.2d 77 (Ok1.1993). All presumptions indulged must be in favor of those whose property is sought to be taken against their will. *Watkins v. Board of Com'rs of Stephens County,* 70 Okl. 30, 174 P. 523 (Okl. 1918).

¶17 It is undisputed that private property may not be taken or damaged by the condemning agency unless the taking or damage is necessary for the accomplishment of a lawful public use. Okla. Const Art. 2, § 23, 24,. The law provides a landowner such as Willis with the right and opportunity to contest the condemnor's right to take his property. There is a

right to a heading on all aspects of the plaintiffs right to condemnation upon timely and proper exceptions to the report of commissioners which challenge the condemnor's right to take the intended particular property. Before an entity having eminent domain authority can appropriate private land to its use, all the steps legally requisite must have been taken. Art. 2 §§ 23,24 Okla. Const.; 66 O.S. 1991, §§ 53,57; *Allen v. Transok Pipe Line Company,* 552 P.2d 374 (Ok1.1976).

¶18 Willis has challenged both the character of the use of the proposed taking as a public use and also its necessity to carry out this proposed public use, thereby raising questions of fact which must be adjudicated by the court. The necessity of taking private property for public purposes in eminent domain proceedings must be determined by conditions existing at the time of the taking. "Necessity" does not, mean an absolute but only a reasonable necessity, and the power of condemnation may be properly exercised in the absence of fraud, bad faith or an abuse of discretion. Whether it is necessary to take particular property for the economic and efficient accomplishment of a lawful public purpose is a question of fact to be determined from the attendant facts and circumstances developed by the evidence. The findings of the trial court on the issue of necessity of the taking will not be disturbed on appeal where there is evidence to support such findings. *City of Tulsa v. Williams,* supra; *McCrady v. Western Farmers Electric Cooperative,* supra; *Luccock v. City of Norman,* supra.

¶19 Under our constitutional provisions and cases interpreting them, the issue of whether a proposed taking is for a "public use" is a judicial question. McCrady v. Western

Farmers Electric Cooperative, supra; Arthur v. Board of Com'rs of Choctaw County, 43 Okl. 174, 141 P.1 (Okl.1914), City of Tulsa v. Williams, 100 Okl.116, 227 P. 876 (Ok1.1924); *Sublett v. City of Tulsa,* 405 P.2d 185 (Ok1.1965); *Delfield v. City of Tulsa,* 191 Okl. 541,131 P.2d 754 (1942).

¶20 The necessity, expediency and propriety of exercising the power of eminent domain are questions of general public policy and are governed by statute. Arthur v. Board of Com'rs., supra; *Luccock v. City of Norman,* supra. A valid declaration of necessity by the appropriate body will be viewed as conclusive by the courts in the absence of a showing of actual fraud, bad faith, or an abuse of discretion by the condemning authority. *Rueb v. Oklahoma City*, supra; *Luccock v. City of Norman*, supra.

¶21 Willis is correct. He was wrongfully denied an opportunity to challenge PSO's asserted but unproven right to take his property as well as the right to conduct discovery. The Court of Civil Appeals decision is vacated and the decision of the trial court is reversed. The cause is remanded for further proceedings not inconsistent with this opinion.

KAUGER, C.J., SUMMERS, V.C.J., and HODGES, SIMMS, OPALA, WILSON, and WATT, JJ., CONCUR. LAVENDER, and HARGRAVE, JJ., CONCUR IN PART, DISSENT IN PART.

APPENDIX F

NOT FOR PUBLICATION
IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA

DIVISION I

[Filed February 8, 1999]

No. 90,569

Public Service Company of Oklahoma, *Plaintiff/Appellee*,	)
v.	)
B. Willis, C.P.A., Inc. *Defendant/Appellant.*	)

APPEAL FROM THE DISTRICT
COURT OF ROGERS COUNTY, OKLAHOMA
HONORABLE JAMES GOODPASTER,
DISTRICT JUDGE

AFFIRMED

William T. Dickson, Tulsa, Oklahoma — For Defendant/Appellant

Court of Civil Appeals for the State of Oklahoma
Opinion - February 8, 1999

Stratton Taylor,
Claremore, Oklahoma
Richard P. Hix,
Jon E. Brightmire,
Tulsa, Oklahoma, For Plaintiff/Appellee.

OPINION

Carl B. Jones, Chief Judge:

Appellee Public Service Company of Oklahoma [PSO] commenced this condemnation action in 1992 to acquire part of a tract of land owned by Appellant accountancy corporation [Owner] for construction of a rail spur to move coal to one of PSO's power plants in Oologah. Appellant questioned whether the taking was truly for a public use, and filed exceptions to the report of the appointed commissioners., The trial court summarily denied the exceptions. Owner appealed.

In March 1995, construction of the rail spur was completed, and PSO's contract rail carrier began operating on the line. In late March, another division of this Court issued an opinion holding that Owner should have been allowed to conduct discovery and to have an evidentiary hearing on the issue whether the rail spur was devoted to a public use. Owner's attorney then wrote to both PSO and the railroad demanding they cease operations on the spur and stating that Owner planned to rebuild the fences and "restore the property to its original use." In response, PSO filed a "Petition for Permanent Injunction, Temporary Injunction and Temporary Restraining Order Against [Owner]" in April, 1995, under the same case number as its eminent domain action. The new

petition alleged, *inter alia*, that "since the time of the [Court of Appeals] ruling, [Owner] corporately and by and through its counsel has notified [PSO] to cease all use of the railroad spur. . . " The trial court issued the requested temporary injunction. Owner did not appeal.

In June, 1997, the Oklahoma Supreme Court issued an opinion on certiorari to review this court's 1995 opinion. The Supreme Court held that Owner was entitled to discovery and a meaningful opportunity for hearing before PSO could condemn and occupy the property, and that both the trial court and this court were wrong to say that the allegation of necessity in PSO's petition was sufficient to shift the burden of persuasion to Owner on the matter of necessity for public use.[1] In September, 1997, Owner filed a motion to vacate the temporary injunction combined with a motion to dismiss the petition for injunctive relief and damages PSO had filed in 1995, and again wrote to PSO and the railroad threatening to rebuild the fence lines around the property and to post "no trespassing signs." The trial court denied both of Owner's motions, and granted it 45 days to conduct discovery in aid of the objections to the commissioners' report. The injunction previously issued was left in place pending the outcome of a hearing on Owner's objections.[2] From that order, Owner has

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[1] ***Public Serv. Co. V. Willis,*** 1997 OK 78, 941 P.2d 995. PSO had presented no evidence to establish necessity except to attach a copy of its board's resolution of necessity to a brief.

[2] The trial court also denied Owner's application for injunction barring further operations on the rail line until the questions of public use and necessity were resolved.

brought the present appeal.

Owner's motion to vacate and to dismiss was filed over two years after entry of the injunction. Unless the order was void, Owner was limited to arguing that the order was entered because of "mistake, neglect or omission of the clerk," "irregularity in obtaining [the] order," or death of one the parties before judgment. 12 O.S.1991 §§1031 (Third), (Sixth); 12 O.S. Supp. 1993 § 1038. A void judgment, decree, or order may be vacated at any time on the motion of a party. 12 O.S. Supp. 1993 § 1038; see ***Stork v. Stork***, 1995 OK 61, ¶ 12, 898 P.2d 732, 738.

The trial court's decision whether or not to dissolve an injunction has been described as "to a certain extent, within the discretion of the court." ***Bourland v. Langford***, 36 Okla. 278, 128 P.240, 240 (1912); *see* ***Cloer v. Gillespie***, 1963 OK 195, ¶ 12, 386 P.2d 1015, 1017. We infer from that statement that the propriety of the trial court's decision is partly a matter of law and partly a matter of fact. Absent a palpable abuse of discretion or clear showing of error, we must affirm the trial court's ruling to grant or undo injunctive relief. ***Cloer***, 1963 OK 195 at ¶ 12, 386 P.2d at 1018.

Owner contends that PSO's 1995 petition seeking injunctive relief and damages should have been filed as a separate action. For that, he relies upon a distinction between "actions" and "special proceedings." In the oft-cited case ***Oklahoma City v. Wells***, 185 Okla. 369, 91 P.2d 1077, 123 A.L.R. 662 (1939), the court distinguished them: "Condemnation proceedings do not involve a tort. Strictly speaking they are not civil actions or suits. They are neither

actions at law nor suits in equity. They are not proceedings according to the course at common law, but are special proceedings," *Id.*, 91 P.2d at 1081. As a corollary, the courts have said that questions unrelated to public use and necessity of the taking or the value of the condemned property are beyond the jurisdictional power of the trial court in a condemnation case. *See* ***Burke v. Oklahoma City***, 1960 OK 29, ¶ 24, 350 P.2d 264, 269-70. In ***Burke***, the court said:

> "Our statutes prescribe the procedure for taking property by eminent domain, but do not provide that matters not germane to the issues involved may be litigated in the same action. The proceedings by the City are to condemn two tracts of land owned by the defendants . . . [D]efendants are not entitled to litigate in this action alleged damages for [*sic*] property which was the subject matter of a previous condemnation proceeding which is not either directly or indirectly involved in the instant case and which the defendants have no interest in. If defendants are entitled to seek damages by virtue of the previous proceedings, their claim can only be litigated in a separate action."

Cf., ***Bowling v. State ex rel. Bd. Of County Comm'rs,*** 1967 OK 121, ¶ 25, 428 P.2d 331, 337 (quoting ***Burke***).

The distinction discussed in ***Wells*** and numerous other cases was embodied in statutory law until 1984. Judicial remedies were divided into "actions" and "special

proceedings." An "action" was defined as "an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense," while "special proceeding" was used to describe all other remedies. 123 O.S.1971 §§ 3-5 (*repealed*). In 1984, those sections were repealed by enactment of the Oklahoma Pleading Code, 12 O.S.Supp.1984 §§ 2001 *et seq.*[3] Repeal did not, however, discard the distinction at law between actions and special proceedings.[4] Condemnation is still referred to as a special proceeding strictly controlled by the constitution and governing statutes. ***Carter v. City of Oklahoma City***, 1993 OK 134, ¶ 12, 862 P.2d 77, 80.

There are three necessary elements of jurisdiction: jurisdiction of the subject matter; jurisdiction over the person; and jurisdictional power to render the particular judgment or decision in question. ***Reed v. Scott***, 1991 OK 113, ¶ 4, 820 P.2d 445, 447. Absence of any one of these elements, if

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[3] *See* Okla.Sess.Laws 1984, ch. 164, § 32.

[4] Examples of other special proceedings are probate, ***Ray v. American Nat. Bank & Trust Co.,*** 1997 OK CIV APP 66, 948 P.2d 1235, *cert. denied*; judicial review of administrative orders, ***Pruitt v. State ex rel. Okla. Empl. Sec. Comm'n,*** 1996 OK CIV APP 33, 918 P.2d 80; an ouster petition following grand jury accusation, ***McCormack v. Town of Granite,*** 1995 OK 105, 913 P.2d 278; insurance company receivership, ***State ex rel. Hunt v. Green***, 1973 OK 29, 508 P.2d 639; and proceedings to declare children delinquent, deprived, or neglected, ***Stratton v. Steele***, 1974 OK 10, 519 P.2d 468.

apparent on the face of the judgment roll, renders the trial court's decision void, and therefore subject to vacation at any time. 12 O.S.Supp. 1993 § 1038; ***Stork v. Stork***, 1995 OK 61, ¶ 12 and n.17, 898 P.2d 732, 738; ***Graff v. Kelly***, 1991 OK 71, ¶ 7, 814 P.2d 489, 492.

Owner invokes the special nature of condemnation proceedings to argue that the trial court lacked jurisdictional power to render injunctive relief in the condemnation case. Because the pleadings allowed in a condemnation action are limited to the petition, demand for jury trial, and objection to the commissioners; report, *see, e.g.*, ***Western Farmers Elec. Coop. V. Willard*** 1986 OK CIV APP 5, ¶ 15, 726 P.2d 361, 364, *cert. denied*, Owner contends that a petition seeking injunctive relief in the same case was improper. On occasion, courts have stated that it is discretionary whether to permit additional pleadings in a condemnation case. *See* ***Incorporated Town of Pittsburg v. Cochrane***, 200 Okla. 497, 197 P.2d 287, 292 (1948); ***Rummage v. State ex rel. Dept. Of Transp.***, 1993 OK CIV APP 39, ¶ 18, 849 P.2d 1109, 1112. Clearly, though, the additional pleadings cannot raise the core issues inherent in a condemnation case; nor can they require the trial court to decide extraneous issues. *See* ***Board of Comm'rs of Creek County v. Casteel***, 1974 OK 31, ¶ 16, 522 P.2d 608, 610-11 (disapproving procedure of accepting answers to petition or to report objections; an answer "will not, in and of itself, raise any issue that can be determined in the proceeding . . .[and] is insufficient to bring to issue the question of amount of damages or the necessity of the taking.").

In a related argument, Owner contends that, because PSO's second petition was filed during the pendency of Owner's first appeal, the trial court lacked jurisdiction to render the order, and the order consequently is void. For that, he quotes from ***Dooley v. Foreman***, 94 Okla. 163, 221 P.47 (1923), which in turn cited ***Egbert v. St. Louis & S.F.R. Co.***, 50 Okla. 623, 151 P. 228 (1915). The court in ***Egbert*** stated the rule:

> It is a general proposition of law that no two courts have jurisdiction of the same cause of action at the same time, and, when a court has once had jurisdiction and lost it by appeal to another court, its authority to deal with the cause is suspended until jurisdiction becomes re-established. . . . And if the trial court makes an order in the cause pending appeal which materially affects the rights of the parties it is null and void.

Id., 151 P. At 229 [citations omitted]. However, the rule is qualified: "[A]n appeal which is taken removes from the jurisdiction of the lower court only the matter involved in the judgment or order from which the appeal is taken. Other independent matters and collateral proceedings are not covered by the appeal, and the lower court retains its jurisdiction over them." ***Herbert v. Wagg***, 27 Okla. 674, 117 P. 209, 211 (1911).

PSO contends that at the time of its second petition, it had a legal right to be on the property, following its tender into court of the amount of damages reported by the

commissioners, and that the trial court's order granting injunctive relief against Owner was a proper act related to enforcement of PSO's and/or its agent railroad to enter upon the property, construct and operate the spur line. PSO cites the case of ***Young v. Seaway Pipeline, Inc.,*** 1977 OK 248, 576 P.2d 1144. In that case, while the trial court was considering the landowner's exceptions to the commissioner's report, the armed landowner threw the condemnor's workman and its counsel off the property. The trial court, at the condemnor's request, issued a temporary restraining order. The appellate court said, "Under the circumstances presented we cannot say that the trial court's decision to grant the temporary restraining order during the interim while the application for injunctive relief was being considered was anything but amply justified." *Id.*, 1977 OK 248 at ¶ 15, 576 P.2d at 1148.

Young involved no demonstrable jurisdictional challenge to the proper scope of orders which may be entered in the course of a condemnation case, and plainly did not involve any matter of jurisdictional power during the pendency of an appeal. Even so, when it is read in the context of ***Wagg,***[5] ***Young*** suggests that granting injunctive relief in aid of a party properly upon the condemned premises, to bar interference with its operations there, is not

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[5] PSO contends that ***Wagg*** was the source for Sup.Ct.R. 1.37(a)(7), 12 O.S.Supp.1997, ch. 15, App., which states that after filing of a petition in error the trial court retains jurisdiction to "take action with respect to any issue collateral to a pending appeal." We merely note the similarity of the principle stated in ***Wagg*** and the appellate rule.

totally unrelated to the issues before the court in a condemnation case.

We hold that the trial court's order for relief to prevent Owner from rebuilding his fence lines across the condemned property and to forestall interference by Owner with operation of the rail spur was a proper exercise of the trial court's jurisdiction. The court did not, as Owner attempts to characterize it, purport "to adjudicate PSO's right to appropriate [Owner's] property." After issuance of mandate in the prior appeal, the trial court was required to give Owner an meaningful, evidentiary hearing on the issues of necessity and public use, applying the appropriate burden-shifting rules. It was not required to undo *all* that had transpired before then. We therefore reject Owner's contention that the trial court lacked jurisdictional power to enter the order granting PSO's request for injunctive relief.

Owner's other arguments are colored by his contention that the Supreme Court's opinion on his first appeal constituted "settled law of the case," which necessarily required dismissal of PSO's claim for injunctive relief made in its second petition. We do not agree. "Settled law of the case" is the doctrine of appellate practice barring relitigation of issues which were finally settled by a previous appellate opinion or which were not timely raised during prior appellate proceedings. ***Barnett v. Barnett***, 1996 OK 60, ¶ 13 n. 13, 917 P.2d 473, 477; ***Jackson v. Jones,*** 1995 OK 131, ¶ 12, n. 37, 907 P.2d 1067, 1074. The first appeal resolved only Owner's right to an evidentiary hearing, and the question whether PSO established a prima facie case of necessity by alleging necessity in its original petition. Neither of those

issues finally determined the propriety of the trial court's subsequent entry of an order granting injunctive relief, and the question could not even have been timely raised during the pendency of the first appeal, because it was not at issue then the first appeal was commenced.

For the reasons expressed in this opinion, we hold that the trial court did not exceed its jurisdiction by entering the order for injunction, and did not err by denying Owner's motion to vacate. The order is affirmed.

AFFIRMED.

HANSEN, P.J. and ADAMS, J., concur.

FILED
NOV 8 1999
CLERK

(2)

No. 99-606

IN THE
Supreme Court of the United States

B. WILLIS, CPA, INC.; and BUCK WILLIS,

Petitioners,

v.

JAMES D. GOODPASTER, sued as: The Honorable James D. Goodpaster; PUBLIC SERVICE COMPANY OF OKLAHOMA; JOHN DOE, sued as: John Doe 1-100,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Sup. Ct. R. 10 12

Other Authority:

Okla. Const. Art. 2, Sec. 24 16

STATEMENT OF THE CASE

A. Background Facts

Respondent Public Service Company of Oklahoma ("PSO") is an Oklahoma public utility which provides electricity to its customers. By virtue of Okla. Stat. tit. 27, § 7 and Okla. Stat. tit. 66, §§ 51-60, PSO is authorized to acquire real property by condemnation.

PSO found it necessary to acquire an easement to build a railroad spur for transporting coal to one of its power plants. A portion of the easement needed by PSO crosses a portion of property owned by Petitioner B. Willis, C.P.A., Inc. ("Willis"). Having failed to acquire the necessary easement from Willis by private purchase, in October 1992 PSO commenced an eminent domain proceeding in state court.[1]

As the Court of Appeals noted in a previous decision in a related appeal from which Willis has also sought certiorari review,[2] the procedure under Oklahoma law to take real property by condemnation may be outlined in five steps:

(1) The state district court, with notice to the landowner, selects a three person commission;

(2) the commissioners inspect the property, and file a report with the clerk of the court setting forth the value of the property to be taken;

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1. *Public Service Company of Oklahoma v. B. Willis, C.P.A., Inc.*, Case No. C-92-507, Rogers County, Oklahoma District Court (hereinafter referred to as the "State Court Condemnation Action").

2. *See B. Willis, C.P.A., Inc. v. Public Service Company of Oklahoma, et al*, 1999 WL 33507, *cert. filed* August 12, 1999 (U.S. Supreme Court No. 99-256).

(3) the condemnor may then pay the assessed sum into court, and take immediate possession of the property consistent with its proposed use;

(4) the landowner may file with the court written exceptions to the report objecting to the public use or necessity of the taking or the value assessed; and

(5) the state district court's judgment on the public use or necessity issues or the compensation issue may be appealed.

1999 WL 335207 at 1. As the Court of Appeals further noted, Oklahoma case law has also established that the landowner has the option to seek an injunction from the state district court to enjoin the condemnor from taking possession prior to the adjudication of the public use question. *Id.* at 3.

In the State Court Condemnation Action, commissioners were appointed by the district court. The commissioners filed their report, setting the total compensation for the taking of Willis's property at $49,920. PSO promptly paid this amount to the court clerk, therefore giving it the right under Oklahoma law to take immediate possession of Willis's property consistent with its proposed use. *See* Okla. Stat. tit. 66, § 53(C).

Willis filed written exceptions to the commissioners' report, contending that the taking was not necessary and was not for a public use, and that the amount of compensation set by the commissioners was inadequate. At no time between the date the commissioners filed their report and the date the state district court ruled on Willis's exceptions did Willis seek an injunction to enjoin PSO from taking possession of

Willis's property after PSO paid the commissioners' award into court.

In March 1994 the state district court ruled in favor of PSO on Willis's claim that the taking was not necessary or for a public purpose. In doing so, the state district court held that the filing of the condemnation petition shifted the burden to Willis to present evidence to vitiate the taking, and rejected Willis's argument that PSO was required to introduce into evidence a resolution of necessity. Willis appealed this ruling.[3] Willis's appeal was limited to whether he was given a proper hearing and whether he was entitled to certain discovery. [4]

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3. Oklahoma Supreme Court Appeal No. 83,358.

4. Willis falsely asserts that in this appeal the Oklahoma Supreme Court ultimately determined that PSO wrongly took possession of Willis's property. PSO's possession of Willis's property had not been accomplished at the time of the state district court's ruling in March 1994, and was not an issue and was not addressed in the court's March 1994 judgment. Nor was the possession issue raised by Willis in the appeal. In its published opinion, *see infra* n.7, the Oklahoma Supreme Court did not address whether PSO's possession was lawful under Okla. Stat. tit. 66, § 53(C). As a full reading of the opinion makes clear, the constitutional and statutory violation found by the Oklahoma Supreme Court concerned Willis's failure to have a meaningful opportunity to be heard as a result of the state district court's ruling on the discovery and burden of proof issues, the two issues appealed.

In several state court proceedings following the Oklahoma Supreme Court's opinion, including at least three in the Oklahoma Supreme Court itself, Willis has made the same false assertion concerning the scope of the opinion. No court has agreed with Willis's fanciful interpretation of the opinion.

During the pendency of the state court appeal, Willis sought interim equitable relief from the Oklahoma Supreme Court prohibiting PSO from constructing the rail spur over Willis's property. Aplee. Supp. App. at 118.[5] Willis argued, among other things, that PSO's proposed taking was not for a public use or reasonably necessary. *Id.* After an adversary hearing, the Oklahoma Supreme Court denied Willis's request for an immediate stay. *Id.* at 122. After a further hearing, the Oklahoma Supreme Court denied Willis any equitable relief, with all justices concurring. *Id.* at 123.

While the state court appeal was pending, in March 1995 PSO completed the railroad spur and began transporting coal over it. When Willis threatened to interfere with the use of the railroad by PSO (and PSO's contract rail carrier), in April 1995 PSO obtained an injunction from the state district court prohibiting Willis from interfering, directly or indirectly, with the use of the railroad spur (the "April 1995 Injunction"). In issuing the injunction, the state district court specifically held that PSO had a right to possession and use of Willis's property under Okla. Stat. tit. 66, § 53(C). Although under Oklahoma law Willis had a right to immediately appeal the entry of the injunction, including the state district court's interpretation of § 53(C), *see* Okla. Stat. tit. 12, § 993, Willis did not exercise this right.

In Willis's state court appeal, the Oklahoma Court of Civil Appeals reversed in part and affirmed in part the state district court's ruling. Relying upon *McCrady v. Western Farmers Electric Cooperative*, 323 P.2d 356 (Okla. 1958), the Court of Civil Appeals agreed with the district court that PSO was not required to file a copy of the resolution of

5. References to "Aplee. Supp. App." are to the record submitted to the Court of Appeals.

necessity with its petition, and held that the simple act of filing the petition which alleges necessity for the taking raises a rebuttable presumption that the condemnation is necessary, shifting the burden to the landowner to rebut the presumption. Pet. App. E at 31a-32a.[6] However, the Court of Civil Appeals held Willis was entitled to certain discovery prior to the hearing, and therefore reversed the judgment for a new hearing following such discovery.

Subsequently, on certiorari review, the Oklahoma Supreme Court vacated the Court of Civil Appeals' opinion and reversed the state district court's judgment in its entirety. In a published opinion, the Oklahoma Supreme Court held the Court of Civil Appeals and the state district court erred in their burden of proof analysis, and further erred in denying Willis certain discovery materials.[7] The Oklahoma Supreme Court remanded the case for a new hearing on the public use and necessity issues consistent with its opinion.

Before a new hearing could be held in the state district court, Willis filed a motion to vacate the April 1995 Injunction and to dismiss the condemnation proceeding based, in part, on the contention it makes here that the Oklahoma Supreme Court's *PSO v. Willis* opinion determined PSO was wrongly in possession of Willis's property. The state district court disagreed with Willis's position and denied Willis's motion. Willis appealed the

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6. References to "Pet. App." are to the appendix of Petitioners' Brief.

7. *Public Service Company of Oklahoma v. B. Willis, C.P.A., Inc.*, 941 P.2d 995 (Okla. 1997) (Pet. App. E at 27a) (hereinafter "*PSO v. Willis*").

denial of its motion.[8] The Oklahoma Court of Civil Appeals affirmed the district court's judgment. Pet. App. F at 38a. After holding that under Oklahoma law "granting injunctive relief in aid of *a party properly upon the condemned premises, to bar interference with its operations there*, is not totally unrelated to the issues before the court in a condemnation case," *id.* at 46a-47a (emphasis added), the court rejected Willis's interpretation of the Oklahoma Supreme Court's opinion in *PSO v. Willis*:

> [Willis's] other arguments are colored by his contention that the Supreme Court's opinion on his first appeal constituted "settled law of the case," which necessarily required dismissal of PSO's claim for injunctive relief made in its second petition. We do not agree. . . . *The first appeal resolved only [Willis's] right to an evidentiary hearing, and the question whether PSO established a prima facia case of necessity by alleging necessity in its original petition.* Neither of those issues finally determined the propriety of the trial court's subsequent entry of an order granting injunctive relief, and the question could not even have been timely raised during the pendency of the first appeal, because it was not at issue when the first appeal was commenced.

Id. at 47a-48a (emphasis added). Thus, contrary to Willis's assertions here, the Oklahoma Court of Civil Appeals recognized that the state district court's ruling that PSO had a right to possession and use of Willis's property in

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8. Oklahoma Supreme Court appeal No. 90,569.

accordance with Okla. Stat. tit. 66, § 53(C), which led to entry of the April 1995 Injunction, was not addressed by the *PSO v. Willis* opinion, nor could it have been because the issue was not even before the Oklahoma Supreme Court in that appeal. The Oklahoma Supreme Court denied Willis's petition for writ of certiorari to review the Court of Civil Appeals' decision. Mandate has issued, and the case is once again before the state district court for an evidentiary hearing on the right to take issue.[9]

In addition to having its interpretation of the scope of the *PSO v. Willis* opinion rejected by the district court and the Oklahoma Court of Civil Appeals, Willis's interpretation of the *PSO v. Willis* opinion has been rejected multiple times by the Oklahoma Supreme Court. In September 1997 Willis filed an application to assume original jurisdiction and sought a writ of prohibition from the Oklahoma Supreme Court. Aplee. Supp. App. at 256. In this proceeding Willis argued that, as a result of the *PSO v. Willis* opinion, "it is now the settled law of the case that PSO's appropriation of Willis's property prior to an evidentiary hearing on PSO's right to take is a violation of Willis's constitutional and statutory rights." *Id.* at 258. Willis cited the very same portions of the *PSO v. Willis* opinion it cites here. *Id.* Following a hearing on Willis's application, the Oklahoma Supreme Court denied the application with all justices concurring. *Id.* at 268.

In November 1997 Willis once again filed an application to assume original jurisdiction and sought a writ of mandamus from the Oklahoma Supreme Court. Aplee. Supp. App. at 279. Willis again made the very same argument

9. The state district court has set a status conference for November 22, 1999, at which time it is expected the court will issue a scheduling order and set a date for the evidentiary hearing.

which forms the basis for his Petition here: that the state district court was failing to follow the mandate of the Oklahoma Supreme Court. In its application to the Oklahoma Supreme Court Willis stated:

> the opinion of the [Oklahoma] Supreme Court clearly holds that PSO's possession of Willis's property before Willis has a meaningful hearing violates Willis's constitutional and statutory rights. As a result, it automatically follows that PSO's continued possession of the property prior to Willis having a meaningful hearing is a continuing violation of Willis's constitutional and statutory rights.

Id. 286. Willis further argued that the state district court was violating the mandate of the Oklahoma Supreme Court by permitting a contempt of court proceeding to be filed against Willis. *Id.*[10] Following a hearing, on December 18, 1997 the Oklahoma Supreme Court entered an order rejecting Willis's arguments, with all justices concurring. *Id.* at 298.[11]

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10. Indeed, Willis's arguments in the state appellate proceedings are virtually identical to those made in the Petition filed in this Court. Willis has simply changed "state district court" in the state proceedings to "Court of Appeals" in its Petition to this Court.

11. Willis also attempted to disqualify the district judge in the State Court Condemnation Action, Judge Goodpaster, based on unsubstantiated allegations by Willis that Judge Goodpaster's orders were based on subversion of the judicial system by PSO. Willis alludes to such unsubstantiated allegations in the Petition. *E.g.*, Pet. at 4, 23-24. Neither the presiding judge of the judicial district nor the Oklahoma Supreme Court, after holding hearings, required disqualification of Judge Goodpaster, despite Willis's (Cont'd)

B. Course of Proceedings and Disposition Below.

On December 9, 1997, Willis filed this action in federal district court. Even though by this time the state district court and the Oklahoma Supreme Court had rejected Willis's interpretation of the *PSO v. Willis* opinion, Willis continued to assert, among other things, that as a result of that opinion (1) PSO was violating Willis's federally protected right to equal protection of the law, (2) PSO was being unjustly enriched, and (3) PSO and Judge Goodpaster were violating Willis's federally protected right to freedom of speech. PSO (and Judge Goodpaster, through real party in interest PSO) filed a motion to dismiss the action. The District Court granted PSO's motion to dismiss.

On appeal, the Court of Appeals affirmed the District Court's dismissal. With respect to Willis's free speech claim, the Court of Appeals relied on *United States v. O'Brien*, 391 U.S. 367 (1968), and held that Willis failed to state a claim for violation of its free speech rights. The Court of Appeals affirmed the dismissal of Willis's remaining claims for substantially the same reasons stated by the District Court in its order.

(Cont'd)
application to both to have Judge Goodpaster disqualified. At these hearings Willis never provided any evidence to support its serious allegations. Indeed, Willis's claim that the proceedings before Judge Goodpaster in 1994 were corruptly subverted is belied by the fact that Willis made no attempt to seek Judge Goodpaster's disqualification until more than three years after the alleged subversion. Willis then attempted to use the fact it named Judge Goodpaster in this lawsuit as a basis for having Judge Goodpaster disqualified. Willis's motive for naming Judge Goodpaster as a defendant, indeed Willis's entire claim of judicial subversion, is transparent on its face.

C. The Petition for a Writ of Certiorari.

Willis requests this Court grant certiorari to review the opinion of the Court of Appeals on but a single proposition: "Is the decision of the Court of Appeals based on a refusal to follow state law as pronounced by the Oklahoma Supreme Court?" Willis contends the Court of Appeals, in dismissing Willis's equal protection, unjust enrichment, and free speech claims, "blatantly" misstated Oklahoma eminent domain law. As Willis makes clear in the opening paragraph of the Statement of Case in its Petition, the basis of Willis's action

> is the acts of [PSO] in continuing to appropriate the use of the property of [Willis] under color of state law prior to a hearing and judicial determination of the public nature of such use in violation of Willis's constitutional and statutory rights after the decision of the Oklahoma Supreme Court to that effect.

The "decision of the Oklahoma Supreme Court" referred to by Willis is the *PSO v. Willis* opinion. Indeed, Willis's entire argument is based on its position that the Oklahoma Supreme Court determined in *PSO v. Willis* that PSO is presently in possession of Willis's property in violation of Oklahoma eminent domain law.

No court, including the Oklahoma appellate courts on multiple occasions, has agreed with Willis's interpretation of the *PSO v. Willis* opinion. Because Willis's entire argument is premised on its faulty interpretation of the *PSO v. Willis* opinion, its argument in support of certiorari review has no merit.

Accordingly, Willis's petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

In its Complaint filed in the District Court, Willis asserted PSO violated Willis's right to equal protection of the law, violated Willis's right to freedom of speech, and was unjustly enriched at the expense of Willis by continuing to appropriate the use of Willis's property after the Oklahoma Supreme Court's opinion in *PSO v. Willis*. In its Petition, Willis asserts the dismissal of these claims by the District Court, and the Court of Appeals' affirmance of that dismissal, was based upon a "blatant misstatement of Oklahoma eminent domain law." To support this assertion, Willis states:

> The basis of this action is the acts of Public Service Company of Oklahoma ("PSO") in continuing to appropriate the use of the property of Petitioner, B. Willis, C.P.A., Inc. ("Willis") under color of state law prior to a hearing and judicial determination of the public nature of such use in violation of Willis' constitutional and statutory rights *after the decision of the Oklahoma Supreme Court to that effect*.

Pet. at 3 (emphasis added) (referring to the *PSO v. Willis* opinion).

The question presented by Willis is not one which this Court should consider on certiorari. Moreover, Willis misstates the scope of the Oklahoma Supreme Court's holding in *PSO v. Willis*, and misstates Oklahoma eminent domain law. The Court of Appeals properly interpreted *PSO v. Willis*, and applied Oklahoma eminent domain law consistent with Oklahoma constitutional, statutory, and decisional law. There is no basis for this Court to exercise its discretion to grant certiorari and review the Court of Appeals' opinion.

A. Willis has failed to identify any consideration under Sup. Ct. R. 10 for this Court to grant certiorari review.

Willis's argument that the Court of Appeals erred in dismissing its claims is not based on the Court of Appeals' resolution of the federal questions involved, but rather is based on Willis's contention that the Court of Appeals misapplied state law. Certiorari review by this Court would necessarily involve interpreting Oklahoma law, namely interpreting the Oklahoma Supreme Court's decision in *PSO v. Willis*.

Such a quest for certiorari review is clearly outside the ambit of Rule 10 considerations governing review on certiorari. This Court should not exercise its judicial discretion to review a decision of the Court of Appeals when the sole argument in favor of review is that the Court of Appeals misapplied a state court decision on a state law issue.

It is important to note that, with respect to Willis's free speech claim, the Court of Appeals' decision was based on this Court's holdings in *United States v. O'Brien*, 391 U.S. 367 (1968), and *Healy v. James*, 408 U.S. 169 (1972), as well as decisions from other circuit courts of appeals. Willis does not contend the Court of Appeals' decision in this case conflicts with these cases. Willis merely asserts the Court of Appeals misapplied the rule of law established by *O'Brien* and the other cited cases because the Court of Appeals misinterpreted a state court decision. As this Court plainly states in Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Willis fails to set forth any compelling consideration for this Court to grant certiorari and review the decision of the Court of Appeals.

B. The Court of Appeals did not "blatantly misstate" the holding of the Oklahoma Supreme Court in *PSO v. Willis*. Rather, the Court of Appeals interpreted *PSO v. Willis* in the same manner as the state courts have on multiple occasions.

The crux of the entire Petition is that the Court of Appeals failed to follow the Oklahoma Supreme Court's holding in *PSO v. Willis*. Willis contends that in *PSO v. Willis* the Oklahoma Supreme Court determined PSO is wrongly in possession of Willis's property. That issue, however, was not before the Oklahoma Supreme Court, nor did the Oklahoma Supreme Court address the issue in its decision. The history of the *PSO v. Willis* opinion, as detailed in the Background Facts, *supra* at 1-4, as well as the plain language of the opinion itself, demonstrates Willis's interpretation of the scope of the *PSO v. Willis* opinion is without basis.

Indeed, in decision after decision, the Oklahoma courts have specifically rejected Willis's arguments and have refused to interpret the *PSO v. Willis* opinion as Willis urged the Court of Appeals to do in this case. For instance, in September 1997 Willis filed an Application to Assume Original Jurisdiction and Petition for Writ of Mandamus with the Oklahoma Supreme Court in which Willis contended that, as a result of the *PSO v. Willis* opinion, "it is now the settled law of the case that PSO's appropriation of Willis' property prior to an evidentiary hearing on PSO's right to take is a violation of Willis' constitutional and statutory rights."

Aplee. Supp. App. at 258. Willis cited much of the same authority it cites in the Petition here. Following a hearing, the Oklahoma Supreme Court denied Willis's application, with all justices concurring. Aplee. Supp. App. at 268.

Willis also asserted its interpretation of the *PSO v. Willis* opinion in the state trial court. The state trial court rejected Willis's interpretation. Aplee. Supp. App. at 269-270. Willis appealed the state trial court's decision to the Oklahoma Court of Civil Appeals. The Oklahoma Court of Civil Appeals affirmed the trial court's judgment, and rejected Willis' characterization of the *PSO v. Willis* opinion. In so holding, the Oklahoma Court of Civil Appeals stated:

> [Willis'] other arguments are colored by his contention that the Supreme Court's opinion on his first appeal constituted "settled law of the case," which necessarily required dismissal of PSO's claim for injunctive relief made in its second petition. We do not agree. . . . *The first appeal resolved only [Willis'] right to an evidentiary hearing, and the question whether PSO established a prima facie case of necessity by alleging necessity in its original petition.* Neither of those issues finally determined the propriety of the trial court's subsequent entry of an order granting injunctive relief, and the question could not have even have been timely raised during the pendency of the first appeal, because it was not at issue when the first appeal was commenced.

Pet. App. F at 47a-48a (emphasis added). The Oklahoma Supreme Court denied Willis' Petition for Writ of Certiorari to review the Court of Civil Appeals' decision.

In November 1997 Willis filed a second Application to Assume Original Jurisdiction and Petition for Writ of Mandamus with the Oklahoma Supreme Court. Aplee. Supp. App. at 279. In this Application, Willis stated:

> The opinion of the Supreme Court clearly holds that PSO's possession of Willis' property before Willis has a meaningful hearing violates Willis' constitutional and statutory rights. As a result, it automatically follows that PSO's continued possession of the property prior to Willis having a meaningful hearing is a continuing violation of Willis' constitutional and statutory rights.

Id. at 286. Willis once again cited many of the same cases it cites to this Court. Once again, the Oklahoma Supreme Court, after affording Willis a hearing, rejected Willis's argument and declined to grant any relief, with all justices concurring. *Id.* at 298.

Quite simply, in the state courts Willis has made the same argument it makes here, and the state courts have rejected Willis's argument each and every time. The Court of Appeals' interpretation of the *PSO v. Willis* opinion is consistent with the interpretation given it by the state courts. Clearly, there was no "blatant misstatement" of the *PSO v. Willis* opinion by the Court of Appeals.

C. Willis's argument fails on the merits.

Because Willis spends much of the Petition arguing the merits of Oklahoma imminent domain law, as opposed to simply arguing why this Court should grant certiorari review, PSO is constrained to briefly respond on the merits. Plainly,

even beyond application of the *PSO v. Willis* opinion. Willis's claim that the Court of Appeals misapplied Oklahoma eminent domain law has no merit, as demonstrated by the three Oklahoma cases upon which Willis relies.

First, in *Watkins v. Board of Commissioners*, 174 P. 523 (Okla. 1918), the plaintiff landowners sought to enjoin the taking of their land by the defendant Board of Commissioners for the construction of a public road. A crucial fact in *Watkins* was that "no compensation had been paid to the plaintiffs *or deposited for their use. . . .*" *Id.* at 523 (emphasis added). The court, after quoting Okla. Const. Art. 2, Sec. 24, including the provision that states "[u]ntil the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, nor the proprietary rights of the owner divested," went on to hold that the defendant Board of County Commissioners had the power to appropriate land when

> the constitutional requirements as to condemnation and compensation are met, which requirements, in the absence of agreement with the landowners, contemplate notice to the landowner and ascertainment of the damages by not less than three disinterested freeholders duly appointed by a court of competent jurisdiction or the judge of such court from the regular jury list for the county in which the land is situated *and the payment of the compensation allowed to the owner, or deposit of same in court for his use,* with the right of trial by jury afterwards to any party aggrieved as to the amount of the damages.

Id. at 525.

In *Watkins*, there was nothing in the appellate record to establish the Board of County Commissioners had begun condemnation proceedings. As the court stated,

> [i]f there were any evidence or matters of which we might take judicial notice in the record before us to show that the land had been duly condemned and appraised upon notice to the owners, we might find that the rights of the plaintiffs had become adjudicated by the action of the district court in the condemnation proceedings . . . .

Id. In the absence of such proceedings, the court properly held that the plaintiffs' property was taken without due process of law.

Unlike in *Watkins*, in this case condemnation proceedings were begun; notice was given to Willis; commissioners were appointed by the state trial court; the commissioners properly filed their report setting a value for the taking; and PSO paid the amount set forth in the commissioners' report into the court for the benefit of Willis, all before PSO began constructing the portion of the rail spur which crosses Willis's property. All the statutory requirements were met before PSO took possession of Willis's property. Thus, *Watkins* is wholly distinguishable, and does not support Willis's contention that it has been denied equal protection of the laws.

Willis also relies heavily upon *Town of Ames v. Wybrant*, 220 P.2d 693 (Okla. 1950). In *Town of Ames* the landowners filed a motion to dismiss a condemnation action on the ground that the plaintiff had no right to condemn the property rights involved. When the trial court deferred consideration

of the issues until after the commissioners' report could be filed, the landowners petitioned the Oklahoma Supreme Court for a writ of prohibition. The landowners were motivated by the fear that if a ruling were deferred until after the commissioners' report was filed, the condemnor would, under Okla. Stat. tit. 66, § 53(C), pay the sum of money set by the commissioners into court as soon as the commissioners' report was filed, take possession of the premises, and begin construction of the improvements, all before a binding determination of the right to condemn could be obtained by the landowners. The Oklahoma Supreme Court refused to issue the requested writ of prohibition, finding that the landowners "as defendants in said causes pending in the district court, are, by law, afforded adequate remedies therein for the protection of their rights *when properly sought*, and we so hold." *Id.*, 220 P.2d at 696 (emphasis added). The Oklahoma Supreme Court then stated:

> In view of the stress laid in the argument upon the alleged threat of plaintiff therein to enter possession before a determination of the question of the plaintiff's right to condemn, we deem it well to say that the district court after objection to the commissioners' report or the trial judge prior thereto in a proper case and upon proper application and showing in connection with preliminary steps in condemnation *could make an order temporarily restraining the condemnor from taking possession of the land pending final determination of the right to condemn.*

Id. (emphasis added). Thus, it is clear that the landowner, if it desires to retain possession pending an adjudication of the right to take issue, must seek an injunction to enjoin possession of the premises by the condemnor.

The third case heavily relied upon by Willis, *Wrightsman v. Southwestern Natural Gas Co.*, 46 P.2d 925 (Okla. 1935), reached the same result 15 years earlier. In *Wrightsman* the court concluded its opinion with the following:

> In order that the scope of this decision may not be misunderstood, it should be stated that we are not herein holding that a trial judge could not, in a proper case and upon proper application and showing in connection with preliminary steps in a condemnation proceeding, *make an order temporarily restraining a condemnor from taking possession of the land pending final determination of the right to condemn by the court proper.*

Id. at 933 (emphasis added).

Thus, under *Town of Ames* and *Wrightsman*, a landowner who wants to have the right to condemn determined prior to losing possession must apply to the trial court for an order "temporarily restraining the condemnor from taking possession of the land pending final determination of the right to condemn." Willis never attempted to exercise this right. Instead, Willis stood idly by and took no action in the state trial court to prevent PSO from constructing the rail spur across his property until well after the railroad was completed and trains began hauling coal.

Finally, as noted earlier, in the State Court Condemnation Action the trial court, in entering the April 1995 Injunction, specifically held that PSO was entitled to use and possession of Willis's property under Okla. Stat. tit. 66, § 53(C). The state trial court's ruling is the only ruling in the State Court Condemnation Action in which PSO's

entitlement to use and possession of Willis's property under § 53(C) has been specifically adjudicated. Under Oklahoma law, Willis had 30 days from the date of the entry of the Order granting the April 1995 Injunction to appeal the trial court's ruling to the Oklahoma Supreme Court. *See* Okla. Stat. tit. 12, § 993. Willis did not do so. That ruling, therefore, constitutes the law of the case and must be followed by the federal courts. The Court of Appeals, in affirming the district court's judgment, properly followed Oklahoma law.

CONCLUSION

The question tendered by Willis for certiorari review, and the arguments proffered by Willis in support of the question presented, do not present any compelling reason for this Court to exercise its discretion to review the opinion of the Court of Appeals. Accordingly, Willis's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 99-606

IN THE
SUPREME COURT OF THE UNITED STATES

B. WILLIS, C.P.A., INC.,
BUCK WILLIS,

Petitioners,

v.

JAMES D. GOODPASTER, sued as:
The Honorable James D. Goodpaster;
PUBLIC SERVICE COMPANY OF
OKLAHOMA; JOHN DOE, sued as:
John Doe 1-100,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT AND AUTHORITIES

In its Brief in Opposition Respondent Public Service Company of Oklahoma ("PSO") makes major misrepresentations as to both the facts and law of this case.

I. PSO IS NOT LAWFULLY APPROPRIATING THE USE OF WILLIS' PROPERTY.

The basis of the Court of Appeals decision with respect to both Willis' First Amendment Freedom of Speech claim and Fourteenth Amendment Equal Protection claim was that PSO and its contractor Burlington Northern and Santa Fe Railway Company ("BN") had a lawful right to utilize Willis' property. In fact, as matter of well developed law by both the United States Supreme Court and the Oklahoma Supreme Court, PSO has no lawful right to utilize Willis' property.

For over a century this Court has held that taking property by eminent domain for a non-public use was a violation of the Fourteenth Amendment.

> To be sure, the Court's cases have repeatedly stated the "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."
>
> Hawaii Housing Authority v. Midkiff
> 467 U.S. 229, 241, 104 S.Ct. 2321,
> 2329 (1984):

As public use is a judicial issue, Sears v. City of Akron, 246 U.S. 242, 251, 38 S. Ct. 245, 248, (1918), if the right to a judicial review of the public use of a taking "is to

serve its full purpose then it is clear it must be granted at a time when the deprivation can still be prevented." Fuentes v. Shevin, 407 U.S. 67, 81, 92 S. Ct. 1983, 1994 (1972).

In Zinermon v. Burch, 494 U.S. 113, 110 S. Ct. 975 (1990) this Court held:

> In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking. Zinermon, 494 U.S. at 132, 110 S. Ct. at 987.

This Court has always been quite specific when property is physically taken through court proceedings:

> **"The right of a citizen to defend his property against attack in a court is corollary to the plaintiffs' right to sue there."** Degen v. United States, 517 U.S. 820, 826, 116 S. Ct. 1777, 1783 (1996). (Emphasis added)

In the state eminent domain proceeding, PSO had its attorney, the President Pro Tempore of the Oklahoma State Senate, make an ex-parte telephone call to the State District Judge who then issued an Order that discovery for Willis was irrelevant because Willis had no right to be heard in court to defend its property.

On Page 3 of its Brief, PSO simply lies about what happened in the State District Court. Compare PSO's assertions to ¶5 of the Oklahoma Supreme Court decision at App. E at 30a.

Willis immediately appealed and also sought an immediate writ from the Oklahoma Supreme Court to prevent PSO from seizing Willis' property. The writ application was denied and Willis subsequently filed a §1983 Civil Rights Claim in the U. S. District Court which challenged the constitutionality of the seizure of Willis' property. The Oklahoma judiciary was faced with a quandary. If it continued to acquiesce in PSO'S possession of Willis' property without a predeprivation hearing, it ran the risk that a Federal court would declare Oklahoma's entire eminent domain scheme -- a contradictory hodge podge of Constitution Articles, statutes and Supreme Court decisions -- unconstitutional.

On June 24, 1997, the Oklahoma Supreme Court issued its decision in PSO v. Willis, 941 P.2d 995 (Okl. 1997). This was over three (3) years after Willis appealed, but only three weeks after Willis filed a Notice of Appeal to the U. S. Court of Appeals in the related Federal litigation.

The decision was sweeping and unequivocal and specifically addressed PSO's possession of the property in the opening paragraph:

> Certiorari was granted in this eminent domain proceeding to consider a landowner's contention that his constitutional and statutory rights were violated as he was denied any meaningful opportunity for a hearing before Public Service Company was allowed to exercise its asserted right to condemn and take possession of his land. We agree. (App. E. at 29a)

Contrary to PSO's claim, in subsequent proceedings the Oklahoma Appellate Courts agreed with Willis' claim that PSO's possession of the property was without legal basis. In the only subsequent appellate decision the Oklahoma Court of Civil Appeals stated:

> In June, 1997, the Oklahoma Supreme Court issued an opinion on certiorari to review this Court's 1995 Opinion. The Supreme Court held that Owner was entitled to discovery and a meaningful opportunity for a hearing before PSO could condemn and occupy the property. (App. F. at 40a)

Contrary to PSO's claim a landowner in Oklahoma is not required to seek an injunction to preserve his right to a predeprivation hearing. In fact, the Oklahoma Supreme Court specifically rejected the concept of requiring the landowner to seek injunctive relief. Wrightsman v. Southwestern Natural Gas Co., 46 P.2d 925, 930 (Ok. 1935).

Interestingly, in PSO V. Willis, supra, the Oklahoma Supreme Court found PSO's possession of Willis' property unconstitutional but made no reference anywhere in the opinion to any requirement for an injunction.

Finally, Willis has not "stood idly by and taken no action" until "well after the railroad was completed."

PSO posted the appraised value of Willis' property with the County Court Clerk in December 1992, and Willis immediately filed a challenge to the public use of the proposed project. As a result of the decision of the Oklahoma Supreme Court in Town of Ames v. Wybrandt, 220 P.2d 693 (Okl.

1950) PSO was precluded from taking possession until the exception was ruled on. Mindful that "the establishment of the right to condemn is a prerequisite to any right of possession by the condemnor" (Town of Ames v. Wybrandt, supra at 695) PSO made no attempt to go on the property even though it had posted the appraised value. Once the exceptions were denied on March 8, 1994, PSO took possession and built its railroad.

Since PSO made no attempt to take possession until after the March 8, 1994, Order overruling Willis' exceptions -- without a meaningful hearing -- Willis had no reason to seek an injunction prior to that time. After that Order, Willis could not seek an injunction because of 66 O.S. §56 which states in part:

> Either party aggrieved may appeal from the decision of the District Court to the Supreme Court; but such review or appeal shall not delay the prosecution of the work on such railroad over the premises in question, if such corporation shall first have paid to the owner of said real property, or deposited with the said clerk for said owner, the amount to assessed by said commissioners or District Court;

As a result, after PSO procured the March 8, 1994 Order, Willis filed an original jurisdiction action with the Oklahoma Supreme Court. PSO's brief at Page 4 described this action as follows:

> During the pendency of the state court appeal, Willis sought interim equitable relief from the Oklahoma Supreme Court prohibiting PSO

> from constructing the rail spur over Willis' property. Aple. Supp. App. at 118. Willis argued, among other things, that PSO's proposed taking was not for a public use or reasonably necessary. *Id.* After an adversary hearing, the Oklahoma Supreme Court denied Willis' request for an immediate stay. *Id.* at 122. After a further hearing, the Oklahoma Supreme Court denied Willis any equitable relief, with all justices concurring. *Id.* at 123.

PSO's claim that Willis waived its right under both the United States and Oklahoma Constitution to a predeprivation hearing on public use is false and scurrilous.

As a matter of well developed constitutional law under the decisions of both the Oklahoma Supreme Court and this Court, neither PSO nor BN have any right to utilize Willis' property. As a result, the basis of the Court of Appeals' decision collapses and the decision must be reversed.

II. THE OKLAHOMA COURTS HAVE NOT REJECTED WILLIS' POSITION

PSO repeatedly asserts throughout its Brief that the courts have repeatedly rejected Willis' position. These assertions are utterly false. In fact, there are only two Oklahoma appellate decisions and both are consistent and support Willis' position.

As previously noted, the Oklahoma Supreme Court held:

> Certiorari was granted in this eminent domain proceeding to consider a landowner's contention that his constitutional and statutory rights were violated as he was denied any meaningful opportunity for a hearing before Public Service Company was allowed to exercise its asserted right to condemn and take possession of his land. We agree. (App. E. at 29a)

As previously noted, the Oklahoma Court of Civil Appeals held:

> In June, 1997, the Oklahoma Supreme Court issued an opinion on certiorari to review this Court's 1995 opinion. The Supreme Court held that Owner was entitled to discovery and a meaningful opportunity for a hearing before PSO could condemn and occupy the property. (App. F. at 40a)

There are no other Oklahoma appellate decisions regarding this issue. PSO is correct that the Oklahoma Supreme Court has repeatedly rejected applications for a Writ of Mandamus to enforce the Oklahoma Supreme Court's own decision. However, a refusal to accept original jurisdiction is not an adjudication as to the merits of the petitioner's claim. The only decision of the Oklahoma Supreme Court as to the legality of PSO's possession of Willis property is PSO v. Willis, supra at App. E., Pg. 27a.

The failure of the Oklahoma Supreme Court to enforce its decision, instead of defeating Willis' §1983 claim, goes to the crux of the case. Willis is being denied the equal protection of the law by PSO and the Oklahoma Supreme

Court by ignoring his rights which the Oklahoma Appellate Courts readily admit are being violated but which they refuse to do anything about.

Willis is confronted with the very situation described by Justice Frankfurter in Snowden v. Hughes, 321 U.S. 1, 15, 64 S. Ct. 397, 405 (1944):

> And if the highest court of a state should candidly deny to one litigant a rule of law which it concededly would apply to all other litigants in similar situations, could it escape condemnation as an unjust discrimination and therefore a denial of the equal protection of the laws?

III. THE COURT OF APPEALS HAS REFUSED TO FOLLOW STATE LAW AS PRONOUNCED BY THE OKLAHOMA SUPREME COURT.

PSO falsely asserts that Willis' contention is that the Court of Appeals "misapplied" state law. Willis' contention is that the Court of Appeals has refused to follow law clearly stated by the Oklahoma Supreme Court. Rule 10a of the Court's rules plainly states that a reason for granting certiorari is that a United States Court of Appeals has decided an important federal questions in a way that conflicts with a decision by a state court of last resort. Rule 10c cites as grounds for certiorari that a United States Court of Appeals has decided an important federal question in a way which conflicts with relevant decisions of this court. Both of these rules are applicable here.

The assertion by the Court of Appeals that PSO and BN have a right to utilize Willis' property reflects a complete refusal to follow the decisions of the Oklahoma Supreme Court in PSO v. Willis, supra, Town of Ames v. Wybrandt, supra and Wrightsman v. Southwestern Natural Gas Co., supra concerning Oklahoma eminent domain law.

IV. WILLIS HAS ASSERTED COMPELLING REASONS FOR GRANTING CERTIORARI.

Contrary to PSO's assertions, Willis is not asking this Court to interpret state law. The Oklahoma Supreme Court interpreted Oklahoma eminent domain law and set it out in unmistakable terms. Having clearly established that Willis' constitutional rights are being violated by PSO's possession of Willis' property prior to a meaningful hearing, the Oklahoma Supreme Court assured there was no danger of state law being declared unconstitutional in light of this Court's decisions on the same issue. However, having done that, the Oklahoma Supreme Court has been content to allow the decision to be ignored by both the inferior state courts it is supposed to supervise and by PSO. When citizens are confronted with such a breakdown in the state judicial system, it is of paramount importance that citizens have access to the federal courts to ensure the enforcement of the Fourteenth Amendment right to equal protection of the law.

In 1907, the year Oklahoma became a state, this Court held:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.

Chambers v. Baltimore and Ohio Railroad, 207 U.S. 142, 28 S. Ct. 34, 35 (1907).

It is difficult to find a more compelling reason for this Court to grant certiorari, particularly in Oklahoma.

CONCLUSION

The Court of Appeals' decision in this case directly contradicts the holdings of this Court in numerous cases cited herein and blatantly misstates Oklahoma eminent domain law as pronounced by the Oklahoma Supreme Court.

The Petition for a Writ of Certiorari should be granted.

/s/_____
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